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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 284

H. T. OVERSTREET, R. BRAZLE AND L. L. GARVIN,
PETITIONERS,

vs.

NORTH SHORE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 7, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 284

H. T. OVERSTREET, R. BRAZLE AND L. L. GARVIN,
PETITIONERS,

vs.

NORTH SHORE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX.

	Original	Print
Record from D. C. U. S., Southern District of Florida	1	1
Complaint	1	1
Memorandum, Waller, J., on motion to dismiss	13	8
Amendment to complaint	16	10
Order dismissing complaint	19	11
Proceedings in U. S. C. C. A., Fifth Circuit	27	11
Opinion, Holmes, J.	27	11
Recital as to order denying rehearing	29	13
Order granting motion for leave to proceed in forma pauperis	38	13
Order allowing certiorari	39	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1942.

[fol. 1]

[File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 393-J Civil

H. T. Overstreet, M. E. Nowlin, J. F. Booth, J. A. Lang, Isadore Barnett, R. Brazle, N. Lang, Jr., Amos Harris, N. W. Smith, R. S. Simmons, L. L. Garvin, W. R. Stewart, F. C. Smith and G. A. Pereira, Plaintiffs,

vs.

The North Shore Corporation and the Bay Shore Water & Light Company, Both Florida Corporations, Defendants

Complaint—Filed September 26, 1941

Plaintiffs, H. T. Overstreet, M. E. Nowlin, J. F. Booth, J. A. Lang, Isadore Barnett, R. Brazle, N. Lang, Jr., Amos Harris, N. W. Smith, R. S. Simmons, L. L. Garvin, W. R. Stewart, F. C. Smith and G. A. Pereira, of Duval County, Florida, sue the North Shore Corporation and the Bay Shore Water & Light Company, both Florida Corporations, with their principal places of business in Jacksonville, Duval County, Florida and allege:

1. This action arises under the Fair Labor Standards Act of 1938, 52 Stat. 1060, U. S. Code, Title 29, Sections 201-219, as hereinafter more fully appears. Jurisdiction is conferred on this Court by Section 41 (8), Title 28, U. S. Code, giving the District Courts jurisdiction "of all suits and proceedings arising under any law regulating commerce."

2. That the defendants, North Shore Corporation and the Bay Shore Water & Light Company are corporations [fol. 2] organized and existing under and by virtue of the laws of the State of Florida, the defendant, North Shore Corporation is the owner and operator of the toll road connecting with the U. S. Highway No. 17, an arterial highway from Jacksonville, Florida to New York City and points north, that the said toll road operated by the North Shore Corporation connects U. S. Highway No. 17 with Ft. George

Island and the intercoastal waterway, which is crossed by the said toll road at Sisters Creek by a draw bridge, also owned, controlled, and operated by the North Shore Corporation as an integral part of said road. That the said toll road is the only means of land communication between Ft. George Island and the rest of the United States. That said road is extensively used by vehicular traffic from points outside the State of Florida to points on said toll road and beyond said toll road and by vehicular traffic from points on said toll road and beyond said toll road to points outside of the State of Florida for hire, that is to say, for a toll or fee. That said road is an integral part of the highway system of the United States. That on Ft. George Island there are located two large clubs whose membership mostly consist of people from states other than the State of Florida who use the said toll road in interstate commerce for hire. That there is a large winter colony on Ft. George Island whose residents come from states other than the State of Florida who use the said toll road in interstate commerce for hire. That on the said road and accessible by land only over the said road are located several fishing camps renting boats, cabins and serving meals that are frequented by the public and are used extensively by visitors from [fol. 3] Georgia, South Carolina and other nearby state who use the said road in interstate commerce for a toll or fee. That the residents and visitors along said road and at Ft. George Island receive mail and parcels from other states over the said road. That the U. S. Post Office Dept. uses the said road for the purpose of delivering mail from states other than the State of Florida to the visitors and residents along the road and on Ft. George Island and its environs. That Sisters Creek is an integral part of the intercoastal canal from Miami to New York. That the said waterway is constantly used in interstate commerce by pleasure craft and freight vessels between Florida and Northern States. That the defendant, the North Shore Corporation operates a draw bridge over the said intercoastal canal which is constantly raised and lowered to permit the passage of boats engaged in interstate commerce. That the said draw bridge is an integral part of the said toll road. That from time to time boats stop at the dock at Sisters Creek Camp to replenish their supplies or have supplies delivered to them from Jacksonville, Florida, and to pick up passengers or discharge passengers; and fur-

ther that on the said toll road and at New Berlin and at Eastport are located several retail stores or stands who purchase various commodities including groceries, oil, fuel, liquors, beer, wearing apparel and other kinds of merchandise for resale to the public. That many of the said commodities sold and offered for resale to the public by the said stores or stands were and are commodities manufactured or produced in states other than the State of Florida, and some were manufactured and produced and resold to the public by the merchants on said toll road in their original packages which were produced in states other than the State of Florida. That the said toll road is used in inter-[fol. 4] state commerce for the delivery of the above stated commodities and others to the said merchants. That the said toll road is the shortest route to both Eastport and New Berlin and that the said road is used for a toll or fee for the delivery of said goods at New Berlin and Eastport over said road, all of which services are performed over the road of the defendant, the North Shore Corporation for hire.

That the Bay Shore Water & Light Company is a subsidiary of the North Shore Corporation and is owned and controlled by the same interest, that it renders certain services to- in connection with the said toll road operated by the parent corporation, the defendant, the North Shore Corporation. That the services of the employees of these two corporations are so interrelated and interchangeable that it is impossible to separate them for the purposes of this suit. That the Bay Shore Light & Water Company owns and controls a telephone line connecting with the Southern Bell Telephone & Telegraph Company at Jacksonville, Florida, over which the residents and visitors of Ft. George Island and its environ- may make and do make long-distance calls, to all parts of the United States and Europe for hire, which telephone line is operated and maintained by the employees of the North Shore Corporation, that the said telephone line is a public service and is used by the public at large for a toll charge. That it is also used in interstate commerce by the Western Union Telegraph Company and the Postal Telegraph Company to render telegraph service to those residing at Ft. George Island and its environs. For the use of this line the said telegraph companies pay to the Bay Shore Water & Light Company

a toll of twenty-five cents per message for all messages transmitted over lines of the Bay Shore Water & Light Company. That the said toll road and the said telephone line have been since the effective date of the Fair Labor [fol. 5] Standards Act of 1938, to-wit: October 29, 1938, and to the date of the filing of this suit daily used in interstate commerce as aforesaid.

3. During the work week beginning the 24th day of October, 1938, and up to and including the time of the filing of this complaint, the defendant, the North Shore Corporation, has employed approximately fifteen men in the maintaining and operating a toll road over which vehicular traffic in interstate commerce passed for monetary consideration to the defendant, the North Shore Corporation and was also operating and maintaining a public telephone line engaged in interstate commerce for a monetary consideration to the defendant, the Bay Shore Water & Light Company.

4. That the plaintiff, H. T. Overstreet, was employed by the defendant, the North Shore Corporation from the effective date of the Fair Labor Standards Act to April 15, 1939, and M. E. Nowlin was employed by the defendant, the North Shore Corporation, from April 15, 1939, to the date of the filing of this complaint, both employees were employed as the operators of the draw bridge on the toll road operated by the defendant, the North Shore Corporation. The said draw bridge crossed Sisters Creek, a part of the intercoastal canal and interstate waterway between New York and Miami; and it became and was their duty to raise and lower said bridge to allow boats to pass under said bridge, many of the boats being operated in interstate commerce daily. That the said H. T. Overstreet and M. E. Nowlin were subject to call to raise and lower the said draw bridge twenty-four hours a day but were actually on duty sixteen hours a day, allowing time for sleep between the times that boats passed through said draw bridge during the perion plaintiffs, H. T. Overstreet and M. E. Nowlin worked for the defendant, the North Shore Corporation in interstate commerce, the North Shore Corporation failed [fol. 6] and refused to compensate the plaintiffs, H. T. Overstreet and M. E. Nowlen, for such employment at a rate of not less than twenty-five cents an hour for forty-four hours a week and 37½¢ an hour for all overtime that

the said plaintiffs, H. T. Overstreet, and M. E. Nowlin, worked each week, this being the minimum rate provided by the Fair Labor Standards Act. The employment of the plaintiffs, H. T. Overstreet and M. E. Nowlin, at such a wage was in violation of Section VI and VII of the Act.

5. That the plaintiff, J. F. Booth, from the date of the Fair Labor Standards Act until the date of the filing of this complaint, was an employee of the North Shore Corporation and was employed as foreman of the maintenance work on the said toll road and the said telephone line as more fully set out in Paragraph 2. That he performed the duties of foreman of the maintenance division of both of the defendant corporations daily and that his services were essential to the use of the said toll road and telephone line in interstate commerce as more fully set out in Paragraph 2.

6. That the plaintiffs, J. A. Lang, Isadore Barnett, R. Brazle, Amos Harris and N. Lang, Jr., are laborers who were employees of the North Shore Corporation and the Bay Shore Water & Light Company. That their duties while such employees consisted of maintenance work on said toll road, that is to say, repairing the road and repairing the bridges which were integral parts of said toll road, that their services were essential to the use of the said road in interstate commerce and that the said road was used in interstate commerce as above stated. That their further duties consisted of erecting the telephone lines and poles of the Bay Shore Water & Light Company, and maintaining and repairing the said telephone lines and poles of the Bay [fol. 7] Shore Water & Light Company, and maintaining and repairing the said telephone lines and poles and that their services were essential to the use of the said telephone line in interstate commerce as more fully set out in Paragraph 2. That the aforesaid duties were performed by the said plaintiffs daily during their said employment.

7. That N. W. Smith, R. S. Simmons, L. L. Garvin, W. R. Stewart, F. C. Smith, G. A. Pereira and M. E. Nowlin were employees of the North Shore Corporation and that their services and duties consisted of selling tickets to and collecting from vehicles using the said toll road in interstate commerce as aforesaid, and that their further duties consisted of collecting telephone tolls and making long-distance connections with the Southern Bell Telephone & Telegraph

Company, to states other than the State of Florida and otherwise operating the said telephone line of the Bay Shore Water & Light Company, however, their entire remuneration was paid by the North Shore Corporation. That their services were essential to the operation of the said toll road and that the said toll road and the said Bay Shore Water & Light Company were operating in interstate commerce as more fully appears in Paragraph 2 in this Complaint and that the said plaintiffs were therefore engaged in interstate commerce.

8. That the plaintiff, H. T. Overstreet, was employed as alleged in Paragraph 4, beginning from the effective date of the Fair Labor Standards Act, April 15, 1939, at a regular wage of $90.00 a month.

That the plaintiff, M. E. Nowlin, was employed as alleged in Paragraph 4, beginning from the 15th day of April, 1939, to the date of the filing of this complaint at a regular wage of $100.00 a month.

[fol. 8] That the plaintiff, J. F. Booth, was employed as alleged in Paragraph 5, from the effective date of the Fair Labor Standards Act until the date of the filing of this complaint at a regular weekly wage of $25.00 a week. That the plaintiff worked approximately, at varying times, from 54 to 84 hours a week.

That the plaintiffs, Isadore Barnett, N. Lang, Jr., J. A. Lang and Amos Harris, were employed as alleged in Paragraph 6, from the effective date of the Fair Labor Standards Act until the date of the filing of this complaint, at a rate from October 24, 1938, until about the 1st day of November, 1939, at a regular wage of twenty-five cents per hour and from or about the 1st of November, 1939, to about the 1st of April, 1941, at a regular wage of seventeen and one-half cents an hour and from or about the 1st of April, 1941, to the date of the filing of this complaint at a regular wage of thirty-two cents an hour. That during the years of 1938, 1939, 1940 and a part of 1941, the said employees worked about 55 hours a week.

That the plaintiff, N. W. Smith, was employed as alleged in Paragraph 7, beginning at the date of the Fair Labor Standards Act until the date of the filing of this complaint at a regular wage of $50.00 a month. That the plaintiff worked approximately 84 hours a week.

That the plaintiff, R. S. Simmons, was employed as alleged in Paragraph 7, beginning at the 1st of October, 1940, and continues working to this date, at a regular wage of $30.00 a month. That the plaintiff worked approximately 84 hours a week.

That the plaintiff, L. L. Garvin, was employed as alleged in Paragraph 7, beginning at the date of December 14, [fol. 9] 1940, and continues working to this date, at a regular wage of $30.00 a month. That the plaintiff worked approximately 84 hours a week.

That the plaintiff, W. R. Stewart, was employed as alleged in Paragraph 7, beginning at the date of January, 1940, to the 1st of September, 1940, at a regular wage of $30.00 a month. That the plaintiff worked approximately 84 hours a week.

That the plaintiff, F. C. Smith, was employed from the effective date of the Fair Labor Standards Act as alleged in Paragraph 7, until February 1, 1940, at a regular weekly wage of $12.00 and worked 96 hours a week. That from February 1, 1940, until May 1, 1941, he was employed at a regular weekly wage of $12.00 a week and worked approximately 84 hours a week.

That the plaintiff, G. A. Pereira, was employed as alleged in Paragraph 7, beginning March, 1940, at a regular weekly wage of $12.50 a week until the 1st of October, 1940, and from October, 1940, until the date of filing this complaint at a weekly wage of $20.00 a week and worked 84 hours a week.

That the plaintiff, N. E. Nowlin, was employed as alleged in Paragraph 7, from the effective date of the Fair Labor Standards Act until the 15th day of April, 1939, at a regular monthly wage of $55.00 per month and worked 84 hours a week.

That the plaintiff, R. Brazle, was an employee of the defendants from the date of the Fair Labor Standards Act until or about the 1st of August, 1940. That he was employed until on about November 1, 1940 at a rate of pay of twenty-five cents an hour and from November 1, 1940, until the 1st of August, 1940, at a regular wage of twenty-seven and one-half cents an hour. That he worked approximately 55 hours a week.

[fols. 10-12] 9. That all of the said plaintiff employees were paid less than the rate specified by Section VI and VII

of the Fair Labor Standards Act of 1938, and the said employees did not receive overtime compensation as prescribed by the Fair Labor Standards Act. And defendants are liable to plaintiffs for plaintiffs' unpaid minimum wages and overtime compensation and an additional equal amount as liquidated damages, and in addition, a reasonable attorneys' fee and costs of this action.

Wherefore, plaintiffs demand judgment against the North Shore Corporation and the Bay Shore Water & Light Company, for the amount of plaintiffs' unpaid overtime compensation, and an additional equal amount as liquidated damages, together with a reasonable attorneys' fee and costs of this action.

John W. Lee, Attorney for Plaintiffs, 601 Fla. Theatre Bldg.; Dillon Hartridge, Attorney for Plaintiffs, 601 Fla. Theatre Bldg.

[fol. 13] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title omitted]

MEMORANDUM ON MOTION TO DISMISS—Filed October 31, 1941

The Fair Labor Standards Act provides that employees engaged in interstate commerce or in the production of goods for commerce shall be paid the minimum wage and shall be paid time and a half for overtime. It does not provide that employees engaged in a business that affects interstate commerce, or in an instrumentality used by others for interstate commerce, shall be paid the minimum wage or time and a half. The employees in this case were maintaining a toll road. Neither the employees nor the employer were engaged in interstate commerce under the decision of the United States Supreme Court in DETROIT BRIDGE COMPANY vs. TAX BOARD, 294 U. S. 83. In the latter case the bridge company was operating an international toll bridge from Michigan to Canada and claimed an exemption from taxation of the annual franchise tax of the State of Michigan. The Michigan Statute exempted from the tax the "capital or surplus of any corporation

represented by property used exclusively in interstate commerce." The bridge company contended that since it main- [fol. 14] tained a toll bridge over which interstate and foreign commerce traveled no tax would be due under the exemption above quoted. The Supreme Court in the above-cited case quoted approvingly the following language from the case of COVINGTON & CINCINNATI BRIDGE CO. vs. KENTUCKY, 154 U. S. 204:

"Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, *because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge.*" (Italics supplied.)

It is difficult to find clearer language. The question involved is whether the road company, and consequently its employees, was engaged in interstate commerce. If it were, the Fair Labor Standards Act would apply. If it were not, it could not apply. There is no distinction between a toll bridge and a toll road. The Supreme Court of the United States has held that the operators of a toll bridge were not engaged in interstate commerce. This decision is, of course, binding on this Court.

Congress had the power to have provided that those engaged in operation of a facility used by others in interstate commerce would be subject to regulation, but Congress did not so provide. The Court cannot legislate.

I consider the drawbridge merely a component part of the toll road. It was put there for the use of the highway and not for the use of a canal or river.

I am of the opinion, however, that the employees of the defendant engaged in the maintenance and operation of the [fol. 15] telephone line, while so engaged, were under the Fair Labor Standards Act.

In view of the numerous motions, interrogatories, and objections to interrogatories, pending, the Court is of the opinion that the motion to dismiss the complaint should be, and the same is hereby, sustained, with leave to the plaintiffs to file an amended complaint in behalf of the employees engaged in maintenance and operation of the telephone line, and that only interrogatories pertinent to issues in such complaint as amended be propounded to

defendants, and that the plaintiffs have twenty days from the date hereof in which so to amend, and that the defendants shall have twenty days thereafter in which to file their defensive pleadings.

Curtis L. Waller, United States District Judge.

October 30, 1941.

[fol. 16] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AMENDMENT TO COMPLAINT—Filed November 6, 1941

Comes now the plaintiffs, by and through their attorney, and amend the Complaint filed in the above entitled cause in the following particulars, to-wit:

By striking the name of the plaintiff, R. Brazle, from the first line of Paragraph Six of the Complaint and adding to the end of Paragraph Six the following:

"That R. Brazle was an employee of the North Shore Corporation engaged in the business of maintaining and repairing the said toll road and repairing the bridges which were integral parts of the said toll road and that his services were necessary to the maintenance and use of the said toll road in interstate commerce."

By striking the name of the plaintiff, L. L. Garvin, from the first line of Paragraph Seven and adding to the end of Paragraph Seven the following, to-wit:

"That L. L. Garvin was an employee of the North Shore Corporation engaged in selling toll tickets and collecting toll tickets from vehicles using said toll road in interstate commerce and that his duties were necessary to the use and maintenance of the said road in interstate commerce."

John W. Lee, Dillon Hartridge, Attorneys for Plaintiffs.

We do hereby consent to the above amendments to the [fols. 17-18] Complaint filed in the above entitled cause.

Smith & Axtell, by W. Gregory Smith, Attorneys for Defendants.

[fols. 19-26] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DISMISSING COMPLAINT—Filed November 10, 1941

The cause coming on to be heard and it appearing to the Court that the plaintiffs, H. T. Overstreet, L. L. Garvin and R. Brazle are unable to amend the complaint in pursuance to the Court's order and the Court being fully advised in the premises;

It Is Hereby Ordered and Adjudged that the complaint in the above styled cause be, and the same is hereby dismissed as to the plaintiffs, H. T. Overstreet, L. L. Garvin and R. Brazle.

Done and Ordered at Tampa, Florida, on the 8th day of November, A. D. 1941.

Curtis L. Waller, Judge.

[fol. 27] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10184

H. T. OVERSTREET, et al., Appellants,

versus

NORTH SHORE CORPORATION, et al., Appellees

In Forma Pauperis

Appeal from the District Court of the United States for the Southern District of Florida

Before Hutcheson, Holmes, and McCord, Circuit Judges

OPINION OF THE COURT—Filed May 28, 1942

HOLMES, Circuit Judge:

The North Shore Corporation owns and operates a toll road that lies wholly within the bounds of Duval County, Florida. The road connects U. S. Highway No. 17, and crosses the Intercoastal Waterway, a navigable stream, by means of a draw-bridge. It is traversed by vehicles in [fol. 28] interstate and intrastate commerce, is used as a route for mail deliveries, and the drawbridge is in frequent

operation to permit passage of vessels moving in interstate and foreign commerce along the Intercoastal Waterway. Appellants are three employees of the corporation *whose duties are, respectively, to tend the draw-bridge, to collect tolls from users of the road, and to repair and maintain the road.* The sole question for decision is whether these employees are engaged in commerce within the meaning of Sections VI and VII of the Fair Labor Standards Act. 29 U. S. C. A., Sec. 206, 207.

In view of the legislative history of the Act and the precise language in which it is drafted, the courts have considered it plain that Congress did not intend for the phrase, "engaged in commerce", to be expanded by construction to embrace employees engaged in the performance of duties merely affecting, burdening, or obstructing interstate commerce; and decisions under other and broader legislation enacted by Congress pursuant to the power to regulate commerce have no application here.[1] Our inquiry, therefore, is whether these employees, tested by the character of the services they performed, actually were engaged in interstate commerce.[2]

We think the decision of the Supreme Court in the case of *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, which was followed by a unanimous court in the case of *Detroit Bridge Co. v. Tax Board*, 294 U. S. 83, is decisive of the narrow issue here presented. In the *Henderson Bridge* case it was held that a company owning and operating a toll bridge that was used exclusively for interstate traffic was not engaged in interstate commerce; that only those [fols. 29-37] who used the bridge and paid the tolls were engaging in interstate commerce. The *Detroit Bridge* case held that the ownership and operation of a bridge spanning the Detroit River between the United States and Canada did not constitute engaging in foreign commerce. In both cases the bridges involved crossed navigable streams.

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[1] Federal Trade Commission v. Bunte Bros., 312 U. S. 349; Jewell Tea Co. v. Williams, 118 F. (2) 202; Jax Beer Co. v. Redfern, 124 F. (2) 172; Swift & Co. v. Wilkerson, 124 F. (2) 176.

[2] Jax Beer Co. v. Redfern, 124 F. (2) 172; Swift & Co. v. Wilkerson, 124 F. (2) 176; Baggett v. Henry Fischer Packing Co., 37 Fed. Supp. 670; Fleming v. A. B. Kirschbaum Co., 38 Fed. Supp. 204.

On the authority of these decisions, we hold that these appellants were not engaging in interstate commerce and were not within the coverage of the Fair Labor Standards Act. If the North Shore Corporation, the employer, was not engaging in interstate commerce by virtue of owning and operating the toll road, certainly those employees whose duties consisted in executing the business of the company were not engaging in interstate commerce. The judgment entered below dismissing the complaint is

Affirmed.

[Petition for rehearing was denied, without opinion, June 30, 1942.]

[fol. 38] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—October 12, 1942

On Consideration of the motion for leave to proceed herein *in forma pauperis*,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 39] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: In forma pauperis. Enter Lucien H. Boggs. File No. 46,785. U. S. Circuit Court of Appeals, Fifth Circuit, Term No. 284. H. T. Overstreet, R. Brazle and L. L. Garvin, Petitioners, vs. North Shore Corporation. Petition for a writ of certiorari and exhibit thereto. Filed August 7, 1942. Term No. 284 O. T. 1942.

FILE COPY

Petition not printed

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 284

H. T. OVERSTREET, R. BRAZLE, L. L. GARVIN,
Petitioners,

v.

THE NORTH SHORE CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONERS.

LUCIEN H. BOGGS,
Counsel for Petitioners.

DILLON HABTRIDGE,
Of Counsel:

INDEX.

Table of Contents.

	Page
I. Opinions below	1
II. Jurisdiction	1
III. Statement of the Case	1
IV. Question presented	5
V. Specification of Errors	5
VI. Argument	6
A. The Circuit Court of Appeals erred fundamentally in holding that the coverage of the employee under the Act must be determined by the relation of the employer to interstate commerce	6
B. The Circuit Court of Appeals further erred in resting its judgment upon decisions of this Court which were not relevant at all to the case at bar	7
C. The complaint shows petitioners are "engaged in commerce", and so are within the coverage of the Fair Labor Standards Act	9
D. The construction of the Fair Labor Standards Act for which petitioners contend is strongly supported by decisions under comparable federal statutes	13
Conclusion	16
Appendix A Excerpts from Fair Labor Standards Act of 1938	17
Appendix B Opinions of Wage and Hour Administrator Excerpted from Wage and Hour Manual, 1941 Edition	19

Table of Cases

Arsenal Building Corp. v. *Walling*, —— U. S. ——, 86 L. Ed. 1954 (No. 924, Oct. Term, 1941)	7
Atkocus v. *Terker*, 4 Lab. Cas. 60,724	11

Page

Covington & Cincinnati Bridge Co. v. *Kentucky*, 154 U. S. 204 8
Detroit Bridge Co. v. *Tax Board*, 294 U. S. 83 8
Fleming v. *Hawkeye Pearl Button Co.*, C. C. A. 8, 113 F. 2(d) 52 10
Henderson Bridge Co. v. *Kentucky*, 166 U. S. 150 8
Kinzell v. *Chicago M & S. P.*, 250 U. S. 130 13
Kirschbaum v. *Walling*, —— U. S. ——, 86 L. Ed. 1054 (No. 910, Oct. Term, 1941) 7
Louisville & Nashville R. R. Co. v. *Parker*, 242 U. S. 13 14
Overstreet v. *North Shore Corp.*, 43 F. Supp. 445, 128 F. 2(d) 450 ..... 1, 2
P. B. & W. R. Co. v. *Smith*, 250 U. S. 101 13
Pedersen v. *D. L. & W. R. Co.*, 229 U. S. 146 13
People v. *Hudson River Connecting R. R. Corp.*, 229 N. Y. 203-215 11
Philadelphia & Reading Co. v. *DiDonato*, 256 U. S. 327 14
Sou Ry. Co. v. *Puckett*, 244 U. S. 571 14
U. S. v. *Darby*, 312 U. S. 115 9
Warren-Bradshaw Drilling Co. v. *Hall*, —— U. S. ——, 87 L. Ed. Adv. Op. 99, No. 21, Oct Term 1942 ..... 9, 10

FEDERAL STATUTES

U. S. C., Tit. 28, Sec. 347(a) (jurisdiction of Supreme Court to review decisions of Circuit Court of Appeals on certiorari) 1
U. S. C., Tit. 29, Secs. 201-209, 52 Stat. 1060 (Fair Labor Standards Act) 2, 9
U. S. C., Tit. 33, Sec. 494, 37 Stat. 736 (Regulation of tolls on bridges of navigable waters) 14
U. S. C., Tit. 45, Sec. 51, 35 Stat. 65 (Fed. Employers' Liability Act) 13
U. S. C., Tit. 49, Secs. 301 et seq, 49 Stat. 543 (Motor Carrier Act of 1935) 14

OTHER AUTHORITIES

Wage & Hour Law Administrator's Opinions 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 284

H. T. OVERSTREET, R. BRAZLE, L. L. GARVIN,
Petitioners,

v.

THE NORTH SHORE CORPORATION.

BRIEF FOR PETITIONERS.

I. Opinions Below.

The opinion of the District Court (R. 8-10) is reported in 43 F. Supp. 445. The opinion of the Circuit Court of Appeals (R. 11-13) is reported in 128 F. (2d) 450.

II. Jurisdiction.

This Court has already exercised its jurisdiction under U. S. Code Tit. 28, Sec. 347 (a) to review the instant case, by entering, on October 12, 1942, its order granting the writ of certiorari to the Circuit Court of Appeals for the 5th Circuit (R. 13).

III. Statement of the Case.

Petitioners, together with others not parties to this petition, brought suit in the United States District Court for

the Southern District of Florida, seeking recovery from respondent and its affiliate Bay Shore Water & Light Company of divers amounts alleged to be due them under the Fair Labor Standards Act of 1938 (52 Stat. 1060, U. S. Code Title 29, Sections 201-219) for unpaid minimum wages, overtime compensation, additional equal amounts as liquidated damages, and attorneys' fees (R. 18).

Respondent moved to dismiss as to all of the plaintiffs (see original typewritten transcript of record pp. 11-12—not reproduced in the transcript of record as printed by the Clerk of this Court). Upon a memorandum opinion (R. 8-10; 43 F. Supp. 445) the District Court granted the motion, but with reference to such of the plaintiffs as were employed in the maintenance of the telephone line operated by Bay Shore Water and Light Company (not respondent) with leave to file an amended complaint. Petitioners not being thus employed, the District Court made the order of dismissal final as to them (R. 11), and from that order they appealed to the 5th Circuit Court of Appeals (see typewritten transcript of record page 21, not reproduced in the printed record).

On May 28, 1942, the Circuit Court rendered its decision (R. 11-13; 128 F. (2d) 450) affirming the District Court. On June 30, 1942, it denied, without opinion, petitioners' petition for rehearing (R. 13). On August 7, 1942, petitioners filed in this Court their petition for writ of certiorari with brief in support thereof and the petition was granted by this Court October 12, 1942 (R. 13).

Of the fourteen plaintiffs in the District Court only three were appellants in the Circuit Court, and are petitioners here. Of the two defendants in the District Court only one was appellee in the Circuit Court and is respondent here. As to all other parties, the action still remains in the District Court.

What this court is called upon to decide is whether the complaint states a cause of action against respondent on the part of the three petitioners. The allegations of the complaint (R. 1-8; amended as to petitioners Brazle and Garvin, R. 10) for present purposes are admitted to be true by the motion to dismiss. They may be summarized as follows:

Respondent is owner and operator of a toll road connecting with U. S. Highway No. 17, an arterial highway extending from Jacksonville, Florida, to New York City and points north. The toll road extends from Highway No. 17 to Fort George Island, an island just off the northern coast of Florida and separated therefrom by the intercoastal waterway which is crossed at Sisters' Creek by a drawbridge, also owned and operated by respondent as a part of the road. The toll road is the only means of land communication between Fort George Island and the rest of the United States.

The road is extensively used by vehicular traffic from points outside Florida to points on the toll road and beyond, and vice versa, and is an integral part of the highway system of the United States. On Fort George Island are located two large clubs whose membership mostly consists of persons from states other than Florida, who also use the road in interstate commerce. Also accessible by land only over the road are several fishing camps which rent boats and cabins and serve meals, used extensively by visitors from Georgia, South Carolina and other nearby states.

Residents and visitors along the road and on the island receive mail and parcels from other states over the road. The United States Post Office Department uses the road, delivering mail from states other than Florida to visitors and residents.

Sisters' Creek is an integral part of the intercoastal waterway from Miami to New York, which is considerably used in interstate commerce by pleasure craft and freight

vessels between Florida and the Northern states; it is crossed by a drawbridge operated by respondent which is frequently raised and lowered to permit the passage of boats engaged in interstate commerce. On the toll road are located retail stores which purchase in interstate commerce for resale various commodities produced in states other than Florida. The toll road is the shortest route both to Eastport and New Berlin and is used as a highway for the delivery of goods at those points.

Petitioner Overstreet was employed by respondent from the effective date of the Fair Labor Standards Act to April 15, 1939, to operate the drawbridge on the toll road, and it was his duty to raise and lower the bridge to allow boats to pass through Sisters' Creek, many of them being operated in interstate commerce daily. While subject to call for 24 hours a day, he was actually on duty 16 hours a day, but was paid at the rate of $90.00 per month, which was less than the minimum provided by the Fair Labor Standards Act.

Petitioner Brazle was a laborer employed by respondent from the effective date of the Fair Labor Standards Act until or about August 1, 1940. His duties consisted of maintenance and repair work of the toll road and of bridges which were parts of the toll road. During the stated period he worked approximately 55 hours per week but was paid only at the rate of 25¢ an hour up to August 1, 1940, and from that time until November 1, *1940* at the rate of 27½¢ per hour, which was at all times less than the minimum prescribed by the Act.

Petitioner Garvin was employed by the respondent to sell and collect toll tickets from vehicles using the toll road from December 14, 1940, to date of suit, during which period he worked approximately 84 hours a week at a regular wage of $50.00 a month, which was less than the minimum prescribed by the Act.

No overtime compensation was received by any of the petitioners from the respondent.

IV. Question Presented.

There is but a single main question, viz.: Does not the protection of the Fair Labor Standards Act of 1938 extend to the following classes of employees of a corporation operating a toll road extensively used as a highway for conveyance of passengers and goods in interstate commerce:

(a) One employed to tend and operate a drawbridge crossing a navigable stream which is an artery of commerce and forms an integral part of the highway?

(b) One employed to do repair and maintenance work on the road and bridge?

(c) One employed to sell tickets and collect tolls for passage on the road?

The District and Circuit Courts in effect answered this question in the negative as to all three classes of employees, and petitioners contend that they erred in so doing. Upon considering the opinions of the District Court (R. 8-10) and the Circuit Court (R. 11-13) certain subsidiary questions also arise; and these will be dealt with in the argument below.

V. Specification of Errors.

Petitioners intend to urge all of the errors assigned on the appeal of the case from the District Court to the Circuit Court of Appeals. The assignment of errors was included in the typewritten transcript furnished this Court by petitioners (pp. 22-23), but as it was not reproduced in the transcript printed by the Clerk, they are copied below:

1. The court erred in ruling that a toll road which is a part of the highway system of the United States, and crosses

navigable waterways, and operates a draw bridge over the intercoastal canal as an integral part of said highway is not such an instrumentality of interstate commerce as to place the operating and maintenance employees of such road under the provisions of the Fair Labor Standards Act of 1938.

2. The court erred in ruling that a draw bridge tender on a toll road, who operates a draw bridge over an interstate navigable waterway, to-wit: the intercoastal canal is not an employee engaged in interstate commerce under the terms of the Fair Labor Standards Act of 1938.

3. The court erred in ruling that laborers engaged in maintenance of a toll road and bridges, where the toll road and bridges are a part of the highway system of the United States, and cross navigable water used in interstate commerce, and the road is used in interstate commerce, though wholly within the State of Florida, are not employees engaged in interstate commerce under the terms of the Fair Labor Standards Act of 1938.

4. The court erred in ruling that an employee of a toll road which is a part of the highway system of the United States, who sells and collects tickets from interstate vehicular traffic for passage over the toll road and its bridges over navigable water are not employees engaged in interstate commerce under the terms of the Fair Labor Standards Act of 1938.

VI. Argument.

A. The Circuit Court of Appeals erred fundamentally in holding that the coverage of the employee under the Act must be determined by the relation of the employer to interstate commerce.

In the course of its opinion the Circuit Court said (R. 13):

> "If the North Shore Corporation, the employer, was not engaging in interstate commerce by virtue of own-

ing and operating the toll road, certainly those employees whose duties consisted in executing the business of the company were not engaging in interstate commerce."

Now petitioners' claims against respondent are grounded upon Sections 6 and 7 (a) of the Fair Labor Standards Act (see App. "A"). Those sections regulate minimum rates of pay and additional pay for overtime solely upon the relationship of the *employee* to commerce, not that of the *employer*, whether the employee is engaged "in commerce" or "in the production of goods for commerce".

The language of the statute is free from ambiguity in this respect and the Circuit Court should have given it full effect as written. This Court did so in *Kirschbaum* v. *Walling* and *Arsenal Building Corp.* v. *Walling*, —— U. S. ——, 86 L. Ed. 1054 (Nos. 910 and 924, Oct. Term, 1941), by determining that the Act covered certain employees of the owners of "loft" buildings because of the relation of their particular duties to the interstate commerce carried on, not by the owners of the buildings, but by their tenants. No determination was made that the building owners were engaged in commerce or in the production of goods for commerce. It is fair to point out that when the Circuit Court reached its decision (May 28, 1942—R. 11), this Court's decision in the *Kirschbaum* case had not been rendered.

B. The Circuit Court of Appeals further erred in resting its judgment upon decisions of this Court which were not relevant at all to the case at bar.

The error of the Circuit Court of Appeals in determining the coverage of the employees (petitioners) by the relation of the employer (respondent) to interstate commerce led it into another error even more glaring. The Circuit Court rested its decision upon the decisions of this Court

in *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, and *Detroit Bridge Co.* v. *Tax Board*, 294 U. S. 83, which decisions it referred to as "decisive of the narrow issue here presented" (R. 12).

The District Judge's decision was based upon the same cases (R. 8-9) although by an obvious clerical error the District Judge referred to the *Covington* case (*Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204) instead of the *Henderson* case.

Now both the *Detroit Bridge Company* case and the *Henderson Bridge Co.* case dealt solely with the status of corporations which claimed that, on account of the nature of the business in which they were engaged, the taxes which the states of Michigan and Kentucky proposed to collect from them would be unconstitutional as a burden on interstate commerce. Neither case involved in any way the status of employees of those corporations.

But an additional and even stronger argument against the reliance placed by the Circuit Court upon those two cases is found upon further analysis. It is this: Both of these cases are concerned with the validity of State franchise taxes imposed upon all corporations similarly situated (whether or not engaged in commerce). These two cases, as well as other decisions of this Court, merely ruled that such taxes were not a burden upon interstate commerce. As this Court said in *Kirschbaum* v. *Walling*, supra (L. Ed. text, p. 1057):

> "Similarly, enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce."

Remembering that the quoted statement was pronounced by this Court in expounding the underlying philosophy of the Fair Labor Standards Act, we submit it is conclusive

upon the inapplicability of the *Henderson Bridge* and *Detroit Bridge* cases to the case at bar.

C. The Complaint shows Petitioners are "Engaged in Commerce" and so are within the coverage of the Fair Labor Standards Act.

So far this Court has not been called upon to decide any case under the Fair Labor Standards Act involving the employees of a privately owned highway or toll road used as an instrumentality of interstate commerce; and the instant case furnishes the only reported decisions by inferior Federal Courts on this question.

Therefore, the problem is to be decided by a fair construction of the statute itself (52 Stat. 1060, U. S. C. Title 29, Secs. 201-219), taking into consideration the decisions of this and other federal courts in other cases arising under the Fair Labor Standards Act and under other federal statutes presenting similar problems. The section of the statute upon which petitioners particularly rely are Sections 2, 6, 7(a), 7(d), and 16(b). A copy of those sections is attached as Appendix "A" to this Brief.

When this Court declared the Fair Labor Standards Act constitutional in *U. S.* v. *Darby*, supra, it said (312 U. S. 115):

> "The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions which competition is injurious to the commerce and to the states from and to which the commerce flows."

The broad purposes of the act thus declared by the Court in the *Darby* case have been fully upheld in other decisions, notably *Kirschbaum* v. *Walling*, supra, and *Warren-Brad-*

shaw Drilling Co. v. *Hall*, —— U. S. ——, 87 L. Ed. Adv. Op. 99 (No. 21, Oct. Term, 1942).

In the *Kirschbaum* and *Arsenal Building Corporation* cases, supra, this Court held that persons acting as engineers, firemen, electricians, elevator operators, watchmen and porters in "loft" buildings most of whose tenants were engaged in interstate commerce were within the coverage of the act. In those cases the Court held that:

> "Without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity."

In neither case was the owner of the building engaged in producing goods for commerce.

The *Warren-Bradshaw Drilling Company* case, supra, involved claims under the Fair Labor Standards Act of members of a rotary drilling crew employed by the Warren-Bradshaw Company which contracted with the owners or lessees of oil lands to drill wells to an agreed upon depth short of the oil sand stratum. When that depth was reached the rotary crew was removed and another crew was charged with the job of bringing the well into production, or demonstrating that it was merely a "dry hole". Warren-Bradshaw Company was not the owner or lessee of the lands upon which the drill crew drilled, and had no interest in the oil produced. Nevertheless, this Court, finding that there was reasonable ground for Warren-Bradshaw to anticipate that oil produced by the wells drilled would move in interstate commerce, held that the members of the drilling crew were within the protection of the Fair Labor Standards Act.

To like effect see *Fleming* v. *Hawkeye Pearl Button Co.* (C. C. A. 8, 1940), 113 Fed. (2d) 52, 56. There employees engaged in cutting round pieces of shell from fresh-water

clam shells which were later pressed into buttons shipped in interstate commerce, were held to be within the protection of the Act.

The three cases last cited, it is true, are all concerned with the definition of employees "engaged • • • in the production of goods for commerce". No contention is made by petitioners that they are within that category, for their claim is that they are "engaged in commerce". Nevertheless, the cases just cited exemplify the liberal construction of the act declared by this Court to be the governing rule in the excerpt from the *Darby* case quoted above.

A broad construction of the coverage of the Act such as petitioners are contending for is likewise given in a number of cases arising in Federal District Courts and State Courts (see cases cited at pages 8-9 of the "Memorandum for the Administrator of the Wage and Hour Division of the Department of Labor" filed in this case in support of the petition for certiorari by the Solicitor General, as amicus curiae.

Because of the paucity of authority on the precise question presented here, we believe this Court will be interested in considering the decision of a Municipal Court in New York City dealing with the Fair Labor Standards Act, viz.: *Atkocus* v. *Terker*, 4 Labor Cases 60, 724. In that case plaintiff, a watchman on a bridge over a navigable stream located entirely within the state of New York, sued under the Act and the Court, upholding his contention, quoted from *People* v. *Hudson River Connecting Railroad Corp.*, 228 N. Y. 203, 215 (Cert. den. 254 U. S. 631), as follows:

> "Congress is given authority over interstate commerce in Article 1, Section 8, of the Constitution. • • •
> In construing this power granted, the words must be understood as employed in their natural sense, as is said by Chief Justice Marshall in Gibbons v. Ogden (9 Wheat. 1, 194), 'Commerce among the states cannot

stop at the external boundary line of each state, *but may be introduced into the interior'.*

It is a comprehensive clause including within its intent, the instruments and means by which interstate commerce is or may be carried on, even if those means or instruments are such as are inherently within a single state, such as the wharf of a trans-atlantic line or the tracks over which pass trains en route from state to state, or the engine used to draw those trains, be it used for ever so short a haul within the state, and if this authority extends to the tracks and the engine, though used wholly within the state, *surely it also includes bridges over which both of these pass and this is particularly true if that bridge cross a navigable stream, the first great recognized instrument of interstate commerce.* (Erie R. R. Co. v. New York, 233 U. S. 671.)" (Italics supplied.)

In this connection the rulings of the Wage and Hour Administrator himself, while not controlling, are persuasive. To avoid burdening the body of this brief there are attached, as Appendix "B", two opinions of the Wage and Hour Administrator on this question, both of them supporting petitioners' position. These rulings of the administrator are in harmony with the authorities and argument set forth above, and when all of these factors are considered we believe the court will find that the allegations of the complaint clearly make out a prima facie case under the Act.

Sections 6 and 7 of the Fair Labor Standards Act (App. "A") place upon a complete parity employees "engaged in commerce" with those "engaged in the production of goods for commerce" and there can be no good reason for construing the definition of the former class any more narrowly than the definition of the latter class. If the same liberality of interpretation applied in the *Kirschbaum* and *Warren-Bradshaw* cases be applied to the situation of these petitioners, the coverage of the act must be extended to them.

If Overstreet did not raise and lower the drawbridge over Sisters' Creek, the interstate commerce could not flow over the inland waterway. If Brazle did not keep the road and bridge in repair there would be interference with interstate commerce, and if Garvin did not collect the tolls on the road there would be no money with which to maintain the road.

D. **The construction of the Fair Labor Standards Act for which petitioners contend is strongly supported by decisions under comparable Federal statutes.**

The Federal Employers' Liability Act (35 Stat. 65, U. S. C. Tit. 45, Sec. 51) extends coverage only to those employees of a railroad who "are employed in such (i.e. interstate) commerce." Decisions of this Court under that Act, disregarding technicalities, have defined the phrase so as to include employees performing "work which has for its immediate purpose the furthering of the conduct of interstate commerce." *Kinzell* v. *Chicago, M. & S. P. Ry. Co.*, 250 U. S. 130, 133.

Two other cases under that Act are of particular interest here because they are concerned with those working on railroad bridges or serving those so engaged:

Pedersen v. *D. L. & W. R. Co.*, 229 U. S. 146. In that case the court holding that one carrying material for repair of a railroad bridge was "engaged in commerce", said (p. 151):

> "*But independently of the statute*, we are of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it." (Italics supplied.)

P. B. & W. R. Co. v. *Smith*, 250 U. S. 101, in which this Court held that a man who cooked for a gang of carpenters

repairing a railroad bridge was "engaged in commerce".

In a number of other cases arising under the Employers' Liability Act, this Court has exercised the like liberality in defining those protected by its coverage: *Louisville & Nashville R. R. Co.* v. *Parker*, 242 U. S. 13, 14-15; *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571-573; *Philadelphia & Reading Ry. Co.* v. *DiDonato*, 256 U. S. 327, 329-331.

Nor is the fact that the cases cited just above deal with the employees of a railroad company, while the case at bar deals with employees of a company operating a highway used for interstate commerce, at all material.

By the Motor Carrier Act of 1935 (49 Stat. 543, U. S. C. Tit. 49, Sec. 301 et seq.) Congress recognized the importance of highways for motor traffic in interstate commerce, and prescribed that such traffic should be regulated as to rates and service by the Interstate Commerce Commission.

By an act passed in 1906, Congress vested in the Secretary of War the duty to regulate tolls on bridges crossing navigable waters, whether constituting interstate boundaries or not (37 Stat. 736, U. S. C. Tit. 33, Sec. 494). In a case under that statute, *Clarksburg-Columbus Short Route Bridge Co.* v. *Woodring*, 89 F. (2d) 788, 794, the Circuit Court of Appeals for the District of Columbia said:

> "Under modern conditions there has grown up a vast and ever expanding network of highways, extending from one end of the country to the other, over which commerce and traffic flow by motor lines and upon the development of which federal and State Governments are expending millions of dollars. The extent to which interstate commerce is carried on over these lines of highways has so threatened the abilities of the railroads to maintain themselves against this competition that Congress has recently found it necessary to place the operators of this commerce under the control of the interstate commerce commission? Motor Vehicle Act of 1935.

"We think that the fixing of just and reasonable rates, whether it be for motor carriers moving over these highways or for structures, such as bridges, which constitute integral parts of such highways should be governed by the same principles which control the rate making of railway traffic." (Italics supplied.)

This Court granted certiorari (301 U. S. 679), but later the case was dismissed as being moot (302 U. S. 658), and no inference arises that this Court disagreed with the legal principles declared by the Circuit Court.

Thus, it is seen that Congress has expressly recognized the important function now played in interstate commerce by highways and highway bridges, and it is fair to assume that the same liberal rulings made by this Court with respect to coverage under the Employers' Liability Act will also be made in determining the definition of employees "engaged in commerce" under the Fair Labor Standards Act. That is particularly true with reference to the duties which all three of these petitioners perform in regard to the bridge over Sisters' Creek. Commerce could not flow through the waterway unless Overstreet raised the draw; unless Brazle made the necessary repairs on the bridge, motor traffic on the road would come to a standstill; if Garvin did not collect tolls, there would be no one to maintain the road or the bridge.

The allegation in the complaint with respect to the function played by Sisters' Creek in interstate commerce is no mere figment of the imagination. The memorandum filed in this Court by the Solicitor General as amicus curiae (page 4, Note 2) digests information officially given to Congress by the Chief of Engineers of the U. S. Army, of which this Court will take judicial cognizance. It shows very substantial traffic on the waterway; that three-fourths of the freight carried in the year 1940, amounting to 219,614 tons, represented shipments in interstate commerce; that commercial

vessels made over 5,000 trips over this portion of the waterway during that year. Surely those who operated and those who assisted in the maintenance of this bridge were performing a real service to interstate commerce.

Conclusion.

Viewing the matter in its broader aspect, if the respondent Corporation does not pay its employees according to the minimum standards prescribed by the Fair Labor Standards Act, how can it keep its employees against the competition of railroads and other interstate carriers who do meet the minimum standards provided by the Act? Such a policy persisted in will necessarily drive competent employees into other lines of activity where proper compensation will be paid them, and thus the toll road operated by respondent will correspondingly lose its power to perform its function as an instrumentality of interstate commerce.

For the reasons above set forth the action of the lower courts in sustaining the motion to dismiss the complaint should be reversed, and the case remanded for appropriate proceedings.

Respectfully submitted,

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APPENDIX A.

Excerpts from Fair Labor Standards Act of 1938

52 Stat. 1060, U. S. Code Tit. 29, Secs. 201-219

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general wellbeing of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Sec. 6 (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

Sec. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is *engaged in commerce or in the production of goods for commerce*—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * * * *

Sec. 7 (d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

Sec. 16 (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained by any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action, shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

APPENDIX B.

Opinions of Wage and Hour Administrator

Wage and Hour Manual, 1941 Edition published by Bureau of National Affairs, Washington, D. C.

P. 34:

"13, Employees of contractors engaged in maintaining, repairing or reconstructing railroads, ships, highways, bridges, pipe lines, navigable waters of the United States, or other essential instrumentalities of interstate or foreign commerce would seem to be engaged in interstate commerce and subject to the Act."

P. 54:

"State Road Repairs—Question: Does the Fair Labor Standards Act apply to those employees of a contractor engaged in repairing a state highway who do not actually take part in the physical construction or repair of the highway?

Answer: (Assistant Solicitor in Charge of Opinions): You state that an employer who has contracted to repair a state highway has leased a gravel pit near the location of the job in which he employs employees solely for the purpose of digging gravel for the highway. In our opinion your position, that the employees engaged exclusively in the production of the gravel are not covered by the Act, is correct.

With respect to the employees engaged in mixing the gravel with oil to produce the black-top material, it is our opinion that they are not covered, provided, of course, that they take no part in the actual physical construction or repair of the highway. If, however, such employees, in addition to the mixing operations, are engaged in pouring macadam on the roadbed or in the rolling and pressing operations performed on the poured macadam, it is our opinion that they are covered by the Act under the principles expressed in paragraph 13 of Interpretative Bulletin No. 5 (see page 34)."

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In the Supreme Court of the United States

OCTOBER TERM 1942

No. 284

H. T. OVERSTREET, R. BRAZLE and L. L. GARVIN,
Petitioners,

vs.

THE NORTH SHORE CORPORATION, a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	PAGE
I. Reference to Official Reports of the Opinions Delivered in the Courts Below	1
II. Statement of Grounds of Opposition to Issuance of Writ	1
III. Statement of the Case	3
IV. Argument	6
Summary of the Argument and Outline of Points	6
1. The questions presented involve solely the matter of the proper construction of the Fair Labor Standards Act	8
2. This case presents no question whether the Petitioners were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act	9
3. The fact that the Employee's duties may affect interstate commerce does not bring about coverage under the clause "engaged in commerce" in Fair Labor Standards Act	9
4. The only questions presented involve the determination whether Petitioners, or any of them, were "engaged in commerce" within the meaning of the Fair Labor Standards Act	12
5. This court's decisions differentiate between a road, highway, bridge or railroad as a thoroughfare, and the transportation operations carried on upon them	12
6. The phrases, interstate "commerce", "transportation" and "transmission" have been defined by this court, and other courts, as excluding a commercial enterprise of the character of that operated by respondent and its employees	14

SUBJECT INDEX (continued)

PAGE

7. The phrases, interstate "commerce," "transportation", and "transmission", having been defined judicially to exclude a commercial enterprise of the character of that operated by respondent and its employees, those phrases, used subsequently, in the Fair Labor Standards Act, are to be understood in the same sense, and the Act is to be understood as excluding such an enterprise 16

8. Discussion of the Authorities relied on by Petitioner 20

9. Conclusion 24

CASE INDEX

PAGE

Anderson v. United States, 171 U. S. 604, 43 L. Ed. 300 13

Atkocus v. Terker 23

Chicago N. W. & R. Co. v. Bolle, 284 U. S. 74, 76 L. Ed. 173 ..... 15, 22, 23

Cliett v. Miami Crystal Ice & Cold Storage Co., ...F. Supp. ...., 6 Labor Cases, par. 61,209 9

Detroit International Bridge Co. v. Corporation Tax Appeal Board of the State of Michigan, 294 U. S. 83, 79 L. Ed. 777 ..... 2, 14, 19

Gouax v. Bovay, 105 F. (2d) 256 ..... 15, 19

Gouax v. Bovay, 308 U. S. 607, 84 L. Ed. 507 15

Grover & B. S. M. Co. v. Florence S. M. Co., 18 Wall. 553, 21 L. Ed. 914 17

Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. Ed. 953 ..... 2, 14, 19

Hopkins v. United States, 171 U. S. 578, 43 L. Ed. 290 .. 13

Jax Beer Co. v. Redfern, 124 F. (2d) 172 11

Johnson v. Filstow, Inc., 43 F. Supp. 930, 5 Labor Cases, par. 61,000 18

Kirschbaum v. Walling: Arsenal Building Corp. v. Walling, ... U. S. ...., 86 L. Ed. 1054 ....8, 9, 10, 18, 21

Lake Superior R. R. Co. v. United States, 93 U. S. 442, 23 L. Ed. 965 ..... 2, 12, 14, 19

CASE INDEX (continued)

PAGE

Pedersen v. D. L. & W. R. Co., 229 U. S. 146, 57 L. Ed. 1125 ..... 20, 23

Pedersen v. J. F. Fitzgerald Construction Co., 262 App. Div. 665, 30 N. Y. S. (2d) 989, 5 Labor Cases par. 60,788 ..... 21, 22, 23

Pedersen v. J. F. Fitzgerald Construction Co., 173 Misc. 188, 18 N. Y. S. (2d) 920, 2 Labor Cases, 481 .. 22, 23

Philadelphia, B. & W. R. Co. v. Smith, 250 U. S. 101, 63 L. Ed. 871 ..... 20, 23

Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 82 L. Ed. 954 8

Shanks v. Delaware L. & W. R. Co. 239 U. S. 556, 60 L. Ed. 436 23

Shannon v. Boh Bros. Construction Co., ...La. App. ...., 8 So. (2d) 542, 5 Labor Cases, par. 61,016 .. 19

Swift & Co. v. Wilkerson, 124 F. (2d) 176 11

U. S. v. Darby, 312 U. S. 100, 85 L. Ed. 609 8

In the Supreme Court of the United States

OCTOBER TERM 1942

No. 284

H. T. OVERSTREET, R. BRAZLE and L. L. GARVIN,
Petitioners,

vs.

THE NORTH SHORE CORPORATION, a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Reference to Official Reports of the Opinions Delivered in the Courts Below.

The case now at the Bar of this Court has been reported as follows:

In the District Court at 43 F. Supp. 445 and 4 Labor Cases, par. 60,736.

In the Circuit Court of Appeals at 128 Fed. (2d) 450 and 5 Labor Cases, par. 61,079.

II. Statement of Grounds of Opposition to Issuance of Writ.

The writ in the case at bar is applied for upon two grounds:

(1) That the Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court.

(2) That the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

We are of the opinion that the authorities hereinafter cited in Argument disclose that the point herein involved has been settled by at least three decisions of this Court, namely:

Lake Superior R. R. Co. v. United States, infra;

Henderson Bridge Co. v. Kentucky, infra;

Detroit International Bridge Co. v. Corporation Tax Appeal Board of the State of Michigan, infra.

If we are correct in this, the grounds asserted in support of the petition for the writ of certiorari are, obviously, not well taken.

And let us consider a part of the first point attempted to be made by counsel for petitioners: That the case involves an important question of Federal Law. In spite of the fact that toll roads and toll bridges belong to the horse and buggy days and that very few now exist in the United States, counsel asserts that this court will take judicial notice that thousands of persons would be affected by the decision in this case.

Counsel makes that point with reference to a privately owned toll road, lying wholly within the borders of Duval County, Florida, which County does not even border upon a neighboring State, and in the case of a road which comes to a dead end on an island (the population of which, in 1940, was 98—as this Court may take judicial notice) near the Atlantic Coast, there being no factories nor any industrial activity along same. The road involved serves only pleasure

resorts and residences. It is not alleged to be and is not a through road and, as appears from the complaint, no substantial amount of what the complaint alleges to be "commerce" goes over the road.

The case as presented involves solely the claim of three men to additional compensation under the Fair Labor Standards Act, as made against a small concern. If it be true, as counsel would have it appear, that the case involves important points, which we do not concede, it would be much more appropriate for this court to decide the points involved in a case involving a through highway or a railroad handling interstate commerce, rather than to take the matter up in a case involving such a purely local enterprise as the complaint exhibits this case to involve.

If a vehicle is to be sought for the expression of this court's views with regard to the phrase "engaged in commerce" as contained in the Fair Labor Standards Act, it is submitted that it would be much to be preferred that such case be in a field in which this court has not already defined commerce by excluding the particular type of business involved.

We also point out that there are no conflicting Circuit Court of Appeals opinions. True, counsel for petitioners do not rely on a conflict in Circuit Court of Appeals opinions in requesting issuance of this writ, but we fail to see, in the light of the foregoing cited decisions of this court, how Circuit Courts of Appeal could disagree on the narrow question here involved.

III. Statement of the Case.

This matter was presented below upon the statement by the Petitioners of their case in their Complaint. The sufficiency of the Complaint, insofar as it stated the case of the Petitioners, was attacked by Motion to Dismiss, and both

the District Court and Circuit Court of Appeals held that the Complaint was insufficient to state a case in favor of the Petitioners under the Fair Labor Standards Act.

The case attempted to be made by the Complaint (R. 2-4) is this:—

The Respondent, The North Shore Corporation, is alleged to be the owner and operator of a toll road (known at common law as a turnpike) connecting with U. S. Highway No. 17, North of Jacksonville, and running to Fort George Island. Those two points are wholly within Duval County, Florida. The allegations of the complaint set up that the toll road connects with U. S. Highway No. 17 and crosses Sister's Creek (the intercoastal waterway) on a drawbridge, also owned, controlled and operated by the North Shore Corporation. It alleges: that the toll road is the only means of land communication between Fort George Island and the rest of the United States; that the road is extensively used by vehicular traffic from points outside of Florida to points on the toll road and beyond and by vehicular traffic from points on the toll road and beyond to points outside the State of Florida, for hire, that is to say, for a toll or fee; that the road is an integral part of the highway system of the United States; that on Fort George Island there are located two large clubs whose memberships mostly consist of people from States other than the State of Florida, who use the road in interstate commerce for hire; that there is a large winter colony on Fort George Island whose residents come from States other than Florida, who use the toll road in interstate commerce for hire; that on the road, accessible by land only over the road, are located several fishing camps renting boats, cabins and serving meals, which camps are frequented by the public and used extensively by visitors from Georgia, South Carolina and other nearby States, who use the road in interstate commerce for hire; that mail and parcels from other states are delivered to

residents and visitors along said road; that the U. S. Post Office Department uses the road for mail delivery; that the intercoastal waterway is constantly used in interstate commerce by pleasure craft and freight vessels, the draw-bridge being constantly raised and lowered to permit the passage of such boats, which are engaged in interstate commerce; that supplies are delivered to such boats at the draw-bridge over Sister's Creek by use of the road; that passengers are picked up and discharged at the same place and use the road; that on the road are several retail stores and stands purchasing commodities, for re-sale to the public, which commodities have moved in interstate commerce, are delivered to them over the road, and move over the road in their original packages; that the road is the shortest route to both Eastport and New Berlin and is used, for a toll or fee, for the delivery of similar goods to those communities.

The complaint, in paragraph 4 (R-5), alleges that the Petitioner, Overstreet, was employed by The North Shore Corporation as the operator of the drawbridge on the toll road; that the drawbridge crosses Sister's Creek, a part of the intercoastal canal and interstate waterway between New York and Miami; that it was Overstreet's duty to raise and lower said bridge to allow boats to pass under said bridge, many of the boats being operated in interstate commerce daily.

The complaint as amended (R. 16) alleges that the Petitioner, R. Brazle, was an employee of The North Shore Corporation engaged in the business of maintaining and repairing the toll road and bridges, which were integral parts of the toll road, whose services were necessary to the maintenance and use of the toll road in interstate commerce.

The complaint as amended (R. 16) alleges that the Petitioner, Garvin, was an employee of The North Shore Corporation engaged in selling toll tickets and collecting them from vehicles using the road in interstate commerce.

There are other allegations, the sufficiency of which is not material at present, to the effect that Petitioners were not paid the minimum wages prescribed by the Fair Labor Standards Act. The demand is for those wages, together with an equal sum as liquidated damages, and attorneys' fees.

Both the District Court and Circuit Court of Appeals have held that the facts alleged did not show that Petitioners were entitled to the benefits of the Fair Labor Standards Act for the reason that it is not made to appear that Petitioners were "engaged in commerce" within the meaning of that act. Petitioners have never attempted to claim, and do not now claim (B. 13), that they were "engaged in the production of goods for commerce."

IV. Argument.

Summarized, the argument of the respondent is as follows: This case involves purely a matter of statutory construction. While the business of the respondent and the duties of its several employees, including petitioners, may remotely affect interstate commerce, that fact does not bring about coverage under the Fair Labor Standards Act. Since no question of "production of goods for commerce" is involved, the inquiry resolves itself solely into one as to whether or not the employees of respondent are "engaged in commerce", within the meaning of the Fair Labor Standards Act. The phrase, "engaged in commerce", meaning "engaged in interstate commerce", and the words definitive thereof, "trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof", having been frequently construed by this court, the rule to be applied is that, in ascertaining the legislative intent, words and phrases, the meaning of which have been ascertained by judicial interpreta-

tion, when used in a subsequent statute, are to be understood in the same sense. The decisions of this and other courts having defined businesses, such as that exhibited by the complaint below, as not in interstate "commerce", "transportation" or "transmission", it follows that Congress may not be deemed to have included persons engaged therein as being within the scope of those words. Petitioners, therefore, are properly held not entitled to the benefits of the act.

This argument, we present under the following points:

1. The questions presented involve solely the matter of the proper construction of the Fair Labor Standards Act.

2. This case presents no question whether the Petitioners were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

3. The fact that the Employee's duties may affect interstate commerce does not bring about coverage under the clause "engaged in commerce" in the Fair Labor Standards Act.

4. The only questions presented involve the determination whether Petitioners, or any of them, were "engaged in commerce" within the meaning of the Fair Labor Standards Act.

5. This court's decisions differentiate between a road, highway, bridge or railroad as a facility or a thoroughfare on the one hand, and the transportation operations carried on upon them on the other hand.

6. The phrases, interstate "commerce", "transportation" and "transmission", have been defined by this court and other courts, as excluding a commercial enterprise of the character of that operated by respondent and its employees.

7. The phrases, interstate "commerce", "transportation", and "transmission", having been defined judicially to exclude a commercial enterprise of the character of that operated by respondent and its employees, those phrases, used subsequently, in the Fair Labor Standards Act, are to be understood in the same sense, and the act is to be understood as excluding such an enterprise.

8. Discussion of the Authorities relied on by Petitioner.

9. Conclusion.

We shall now proceed to discuss these points:

1. The Questions Presented Involve Solely the Matter of the Proper Construction of the Fair Labor Standards Act.

The power of the Congress under the Commerce Clause has been frequently discussed and enunciated by this court. That the power extends to businesses, the operation of which merely "affects" commerce, is well settled.[1] That the Fair Labor Standards Act is constitutional is settled.[2] Its application, under the Fair Labor Standards Act, to employees in businesses, the operation of which merely affects Commerce, under the phrase "engaged in the production of goods for commerce", defined in the Act as including "any process or occupation necessary to the production", has been determined.[3] None of the foregoing matters is here involved. This case involves solely the meaning and scope of the phrase "engaged in commerce", as contained in the Fair Labor Standards Act. The Act,

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[1] *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 82 L. Ed. 954.

[2] *United States v. Darby*, 312 U. S. 100, 85 L. Ed. 609.

[3] *Kirschbaum v. Walling; Arsenal Building Corporation v. Walling*, . . . U. S. . . ., 86 L. Ed. 1054.

in Section 6, prescribes the payment by an employer of certain minimum wages "to each of his employees who is engaged in commerce or in the production of goods for commerce", and, in Section 7, payment of overtime compensation to "any of his employees, who is engaged in commerce or in the production of goods for commerce". Section 3(b) defines "commerce" as "trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof".

> "The Act, except in the matter of 'production of goods for commerce,' contains no provision making 'any process or occupation necessary to the production' of goods applicable to interstate commerce as distinguished from production of goods for commerce."
>
> *Cliett v. Miami Crystal Ice & Cold Storage Co.*, . . . F. Supp. . . . ., 6 Labor Cases, par. 61,209.

2. This Case Presents no Question Whether the Petitioners Were "Engaged in the Production of Goods for Commerce" Within the Meaning of the Fair Labor Standards Act.

On page 13 of Petitioner's Brief it is said:—

> "Petitioners do not contend that they are 'engaged . . . in the production of goods for commerce', and so the whole question turns on whether they are 'engaged in commerce'."

The record bears out this statement.

3. The Fact that the Employee's Duties May Affect Interstate Commerce Does Not Bring About Coverage Under the Clause "Engaged in Commerce" in the Fair Labor Standards Act.

In the *Kirschbaum* case, it was pointed out, in this court's opinion, that Congress has deliberately refrained

from occupying, in the Fair Labor Standards Act, the whole field to which its power extended. In that connection, it was said, among other things:

> "Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local."
>
> "The history of Congressional legislation regulating * * * interstate commerce * * * justifies the generalization that, when the federal government takes over * * * local radiations in the vast network of our national economic enterprise * * * those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation."
>
> "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce'. See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Rec. 7749-50. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce'. H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158, 9266-67."

Here, as in that case, the question arises:—

> "Since the scope of the Act is not coextensive with the limits of the power of Congress over commerce, the question remains whether these employees fall within the statutory definition of employees 'engaged in commerce or in the production of goods for commerce', construed as the provision must be in the context of the history of federal absorption of governmental authority over industrial enterprise. * * * the Fair Labor Standards Act puts upon the courts the independent responsibility of applying ad hoc the

general terms of the statute to an infinite variety of complicated industrial situations."

As the Circuit Court of Appeals for the Fifth Circuit has put it:

> "In the case of Jax Beer Company v. Redfern, etc., 124 F. 2d 172, decided today, we had occasion to point out that the critical words of Sections 6(a) and 7(a) of the Fair Labor Standards Act are 'engaged in commerce or in the production of goods for commerce,' and that the application of the minimum wage and maximum hours provisions of these sections is dependent upon the nature of the work performed by the particular employee, and not upon the fact that the business of the employer may in some manner 'affect commerce'."
>
> *Swift & Co. v. Wilkerson*, 124 F. 2d 176.

> "As to what is and what is not interstate commerce the appellees and the Administrator of the Wage and Hour Divison, in his brief as amicus curiae, lay stress upon the language contained in many decisions under the National Labor Relations Act, 29 U. S. C. A. Sec. 151 et seq. These cases are not altogether applicable for, as pointed out by the Supreme Court, the 'critical words' of the National Labor Relations Act are 'affecting commerce'. Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 467, 58 S. Ct. 656, 82 L. Ed. 954."
>
> *Jax Beer Co. v. Redfern*, 124 F. 2d 172, 174.

Counsel for Petitioners contend for a liberal construction of the law. We meet this contention with the assertion that what is to be sought is a fair interpretation of the language used by Congress in the law. Congress could have extended the law to the operations of all businesses which "affected" commerce, including any process or occupation necessary thereto, as in the case of "production of goods

for commerce". That Congress specifically extended the one phrase (production for commerce) and not the other (commerce) would seem especially significant. The maxim "*expressio unius est exclusio alterius*" seems applicable.

4. The Only Questions Presented Involve the Determination Whether Petitioners, or Any of Them, Were "Engaged in Commerce" Within the Meaning of the Fair Labor Standards Act.

The discussion thus far brings us clearly to the conclusion here expressed. That Petitioners agree is borne out by their affirmative assertion, the leading point in their Brief (B.12):

> "(1) The Complainant Shows Petitioners are 'Engaged in Commerce' and so are Within the Coverage of the Fair Labor Standards Act."

5. This Court's Decisions Differentiate Between a Road, Highway, Bridge or Railroad as a Facility or a Thoroughfare on the one Hand, and the Transportation Operations Carried on Upon Them on the Other Hand.

To establish this point we quote from *Lake Superior R. R. Co. v. United States*, 93 U. S. 442, 23 L. Ed. 965, 970.

> "We know, as well as we know the sense of any phrase in the English language which has a historical meaning and application, what is meant when a railroad is spoken of in a law as a '*public highway*'. We know that it *refers to the immovable structure stretching across the country*, graded and railed for the use of the locomotive and its train of cars.
>
> "But it is not alone in charters which contemplate the creation of railroads as public highways that we find evidence of the understood *distinction between railroads as mere throughfares, and the operations to*

be carried on upon them by means of locomotives and cars. This is manifest from the fact, amongst other things, that express power is invariably given (if intended to be conferred) to the railroad company to equip its road, and to transport goods and passengers thereon, and charge compensation therefor. This practice evidently springs from the conviction that a *railroad company is not necessarily a transportation company,* and that, *to make it such, express authority must be given for that purpose,* in compliance with the rule that no power is conferred upon a corporation which is not given expressly or by clear implication.

"In view of the legislative history and practice referred to, it seems impossible to resist the conclusion, when we meet with a legislative declaration to the effect that a particular railroad shall be a public highway, that the meaning is, that it shall be open to the use of the public with their own vehicles; and that when Congress, in granting lands in aid of such a road, declared that the same shall be and remain a public highway for the use of the Government of the United States, it only means that *the Government shall have the right to use the road, but not that it shall have the right to require its transportation to be performed* by the railroad company. And when this right of the use of the road is granted 'free from all toll or other charge for transportation of any property or troops of the United States,' it only means, that the Government shall not be subject to any toll for such use of the road. This, we think, is the natural and most obvious meaning of the language used, when viewed in the light afforded by the history of railroad legislation in this country." (Emphasis added).

The same differentiation is to be found in *Hopkins v. United States,* 171 U.S. 578, 43 L. Ed. 290 and in *Anderson v. United States,* 171 U.S. 604, 43 L. Ed. 300, and is apparent from the cases now to be cited under point 6.

6. The Phrases, Interstate "Commerce", "Transportation", and "Transmission", Have Been Defined by This Court, and Other Courts, as Excluding a Commercial Enterprise of the Character of That Operated by Respondent and Its Employees.

These pertinent statements have been made by this court:—

In *Lake Superior R. R. Co. v. United States*, supra, (L. Ed. report, p. 968) it is said:—

> "The case of a turnpike • • • would have furnished no difficulty whatever. Those thoroughfares are usually constructed and owned by companies who have nothing to do with transportation thereon. They merely furnish the thoroughfare."

In *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. Ed. 953, 954, it is said:—

> "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge."

In *Detroit International Bridge Company v. Corporation Tax Appeal Board of the State of Michigan*, 294 U. S. 83, 79 L. Ed. 777, 779, it is said:

> "The record discloses that the appellant owns, maintains and operates a bridge between Michigan and Canada across the Detroit River; that for passing over this it demands and collects tolls from vehicles and pedestrians. It 'conveys no persons or goods across the international boundary line. It merely collects tolls from such persons as use it (the bridge). It provides an instrumentality which others may use in conducting foreign commerce.'"

"After much consideration, and notwithstanding emphatic dissent, Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. Ed. 953, 17 S. Ct. 532, held that a Kentucky Corporation which owned and operated a bridge over the Ohio River between that State and Indiana, and collected compensation from railroads using the structure, was not engaged in interstate commerce. By Chief Justice Fuller this Court said (p. 153):

"'The company was chartered by the state of Kentucky to build and operate a bridge, and the State could properly include the franchises it had granted in the valuation of the company's property for taxation. Central P. R. Co. v. California, 162 U. S. 91, 40 L. Ed. 903, 16 S. Ct. 766. The regulation of tolls for transportation over the bridge considered in Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087, 4 Inters. Com. Rep. 649, presented an entirely different question.

"'Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge'."

In *Chicago & N. W. R. Co. v. Bolle*, 284 U. S. 74, 76 L. Ed. 173, 176, it is said:

"It will be observed that the word used in defining the test is 'transportation,' not the word 'commerce.' The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employee at the time of his injury is engaged in interstate commerce, within the

meaning of the act, naturally must be whether he was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it."

Similarly we think it must be said that the word "transmission" is a word of narrower significance than the word "commerce".

The Circuit Court of Appeals for the Fifth Circuit in *Gouax v. Bovay*, 105 Fed. (2d) 256, 258, said:

> "Section 4 fully covers the matter of toll charges, which are accurately described as for the 'transit' of engines, vehicles and passengers. Section 3 relates to the charges the bridge may make for its use by railroad. Section 2 we are persuaded is not directed at all to charges made by the bridge company for 'transit', but to charges made by carriers against the United States for the 'transmission' of the mail or 'transportation' of troops and munitions across the bridge. The bridge company does not *transmit* or *transport* these, but merely permits the *transit* of them."

This Court denied certiorari in that case. Gouax v. Bovay, 308 U. S. 607, 84 L. Ed. 507.

We think it fairly apparent from the above quotations that, by judicial definition, prior to the enactment of the Fair Labor Standards Act, "commerce" was understood to exclude the operation of turnpikes and toll bridges. Of the foregoing cases only *Gouax v. Bovay* was decided after the passage of the Fair Labor Standards Act.

7. The phrases, Interstate "Commerce," "Transportation", and "Transmission", Having Been Defined Judicially to Exclude a Commercial Enterprise of the Character of that Operated by Respondent and its Employees, Those Phrases, Used Subsequently, in the Fair Labor

Standards Act, Are to be Understood in the Same Sense, and the Act is to be Understood as Excluding Such an Enterprise.

So far as counsel know, there is no more firmly fixed rule than that contained in the following quotation from *Grover & B. S. M. Co. v. Florence S. M. Co.*, 18 Wall. 553, 21 L. Ed. 914, 922:—

> ". . . the language employed . . . to describe the parties and the suit in which the alien defendant or the non-resident may remove the cause into the Circuit Court for trial, is identical with the language employed in the Judiciary Act, the two provisions differing only in the particulars heretofore sufficiently explained, showing that the well established rule applies in construing the later Act, that words and phrases, the meaning of which in a statute have been ascertained by judicial interpretation, are, when used in a subsequent statute, to be understood in the same sense. Pott. Dwarris, 274; Bac. Abr. 'Statute' I; Pennock v. Dialogue, 2 Pet., 18; Cathcart v. Robinson, 5 Pet. 280; McCool v. Smith, 1 Black, 469; Com. v. Hartnett, 3 Gray, 450; Ruckmaboye v. Mottichund, 32 Eng. L. & E., 84; Bogardus v. Trinity Church, 4 Sandf. Ch., 633; Rigg v. Wilton, 13 Ill. 15; Adams v. Fields, 21 Vt. 256. Such a construction in the case supposed becomes a part of the law, as it is presumed that the Legislature in passing the later law knew what the judicial construction was which had been given to the words of the prior enactment."

The words "commerce", "transportation" and "transmission" having been construed, prior to the passage of the Fair Labor Standards Act, to exclude turnpikes and toll-bridges, we submit that those words in that Act are to be understood as excluding turnpikes and toll bridges. If the operation of such an enterprise is not within those words, it is not worthwhile to indulge in refinement to

the extent of trying to determine whether an employee could be "engaged in commerce", even though the cases hold that his employer is not. The words "commerce", "transportation" and "transmission", exclude the operation of turnpikes and toll-bridges, whether by employer or employees.

Opposing counsel have taken the position that the authorities relied on by us merely hold that the employer in this case is not "engaged in commerce", and that the employees may be so engaged, even though the employer is not. This does not seem to be within the meaning of the language in the *Kirschbaum* case, where it is said:—

> "* * * the provisions of the Act expressly make its application dependent upon the character of the employees' activities. * * * to the extent that his employees are 'engaged in commerce or in the production of goods for commerce', the employer is himself so engaged."

What has been said in another case on the converse of that proposition by Judge Waller, the District Judge who rendered the opinion in this case below, is so forceful that we resist, with difficulty, the desire to quote him at length. In the Preamble to the Act, and in the several sub-sections thereof, which he carefully analyzes, the Judge points out and emphasizes numerous items, which lead him to the conclusion that:—

> "The words 'employer' and 'employee' are used in a concomitant relationship throughout the Act. The relationship of employer and employee is inseparable. The conclusion is inevitable that if an employee is engaged in commerce it is presupposed that his employer must also be."

Johnson v. Filstow, Inc., 43 F. Supp. 930, 931, 5 Labor Cases, Par. 61,000.

We are of the opinion that the statement, made by the Circuit Court of Appeals, which counsel for Petitioners seem to think (we believe, erroneously) indicates that that Court applies an "employer" test, was eminently correct. To us it seems a self-proving, unimpeachable verity that:—

> "If the North Shore Corporation, the employer, was not engaging in interstate commerce by virtue of owning and operating the toll road, certainly those employees whose duties consisted in executing the business of the company were not engaging in interstate commerce."

In any event, it seems to us that the law is as stated by the Court of Appeals of Louisiana in the case of *Shannon v. Boh Bros. Construction Co.*, . . . La. App. . . ., 8 So. (2d) 542, 545, 5 Labor Cases, Par. 61,016, namely:—

> "It is said that (certain) cases are not applicable here because railway employees are considered covered by the Employers' Liability Act because of the interstate character of their employer's business, whereas under the Wage and Hour Law the employer's business is immaterial, the criterion being the occupation of the employee. It seems to us, however, that judicial interpretations of interstate commerce, no matter how provoked, are as pertinent to the consideration of the Wage and Hour Law as they would be to any other statute where the question is whether the employer or employee is employed in interstate commerce." (Bracket supplied).

In the latter case, without the benefit of *Lake Superior R. R. Co. v. United States*, *Henderson Bridge Co. v. Kentucky*, *Detroit International Bridge Company v. Corporation Tax Appeal Board* or *Gouax v. Bovay*, the Louisiana Court of Appeals arrived at the conclusion that one engaged in repairing a city street in the City of New Orleans, over which vehicles engaged in interstate commerce passed, was

not himself "engaged in commerce" and was not within the coverage of the Fair Labor Standards Act.

8. Discussion of the Authorities Relied on by Petitioner.

Counsel seem to rely upon *Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146 and *P. B. & W. R. Co. v. Smith*, 250 U. S. 101. We think they can get scant comfort from those cases. It will clearly appear from the following quotation that the matter under investigation in those cases was the closeness of the connection of the work of the employee with the interstate commerce in which his employer was engaged. Only by virtue of the employer's engagement in commerce did this court decide that the employee could be so engaged. Here the employer is not engaged in commerce at all. There:—

> "That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, ma-

chinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. *The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?* See McCall v. California, 136 U. S. 104, 109, 111, 34 L. Ed. 391, 392, 393, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 6, 59, 56 L. Ed. 329, 350, 38 L. R. A. (N.S.) 44, 32 Sup. Ct. Rep. 169; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893, 897, 898; Central R. Co. v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901; Darr v. Baltimore & O. R. Co. 197 Fed. 665; Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1. Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such." (Emphasis added.)

Pedersen v. Delaware, Lackawanna & Western Railroad Company, 229 U. S. 146, 57 L. Ed. 1125.

This decision is correctly analyzed, we believe, by the Appellate Division, 3rd Department, New York Supreme Court, in *Pedersen v. J. F. Fitzgerald Construction Co.* 262 App. Div. 665, 30 N. Y. S. (2d) 989', 5 Labor Cases, par.

'This case is referred to in a footnote in the Kirschbaum case in this Court.

60,788, affirming 173 Misc. 188, 18 N. Y. S. (2d) 920, 2 Labor Cases, 481, where it is said:

> "While the railroad company was obviously engaged in interstate commerce, the defendant was an independent contractor employed by the railroad to perform work clearly local in its character and separate and distinct from such commerce. (Browning v. Waycross, 233 U. S. 16, 22). Plaintiffs were at no time employed by the railroad company. We have no such situation as found in Pederson v. Delaware, Lackawanna & Western R. R., 229 U. S. 146, for there the work was being prosecuted by a railroad engaged in interstate commerce and the work was so clearly connected with it as to be a part thereof. Here, the defendant was not engaged in interstate commerce and was simply performing local construction work which was neither an interstate occupation nor commerce. (General Railway Signal Co. v. Virginia ex rel. Corporation Commission, 246 U. S. 500). Interstate commerce means interstate commercial intercourse, and while defendant pursuant to its contract was engaged in work upon an instrumentality of interstate commerce, the performance of such work does not constitute such commerce. (McKee v. Ohio Electric Railway Co., West Virginia Supreme Court of Appeals, 88 S. E. 616)."

In *Chicago & N. W. Ry. Co. v. Bolle*, supra, it was held that an employee, receiving an injury while engaged in work not incidental to transportation in commerce, but purely incidental to the furnishing of steam for heating the station and other structures of the Railroad Company, his duties being confined to the production of a supply of steam for that purpose, which steam was not to be used directly or indirectly in the transportation of anything, was not "engaged in commerce" within the meaning of the Employer's Liability Act.

In this latter decision the court reviewed the cases, including *Pedersen v. Delaware, Lackawanna & Western Railroad Co.*, supra, and seems materially to constrict earlier decisions. Although the case does not cite *P. B. & W. R. Co. v. Smith*, supra, it seems, effectively, to overrule it. The true test, for determining whether there was "employment in commerce", firmly established by the *Bolle* and *Shanks* (*Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436) cases is, was the employee at the time of the injury engaged in the interstate transportation carried on by his employer or in work so closely related to it as to be practically a part of it.

In the light of the *Bolle* case, we do not believe that *P. B. & W. R. Co. v. Smith* is good law, but, in any event, there the *employer* was in "commerce," and the employees' duties were considered as an integral part thereof, and the test in *Pedersen v. Delaware, L. & W. R. Co.* was applied. That test can have no application here.

In *Alkocus v. Terker*, unreported, so far as we know, cited by counsel for Petitioners, the court did not have the advantage of the cases herein cited, and seems to have been more concerned with the power which Congress has under the Commerce clause, rather than with the question whether, in the situation before that court, Congress had seen fit to exercise its power. We believe that that court, (which is inferior to the court which handed down the *Pedersen v. J. F. Fitzgerald Co.* decision), missed the whole crux of the problem. We admit that that decision is contrary to the position which we take. We doubt its persuasive force, as well as its correctness.

We cannot see that the other decisions cited have any application to our situation.

9. Conclusion.

We conclude, and respectfully submit, that none of the Petitioners have brought their cases within the protection of the Fair Labor Standards Act, by establishing that they were "engaged in commerce" within the meaning of that Act, and that their cases must fail.

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Supreme Court of the United States

OCTOBER TERM 1942

No. 284

H. T. OVERSTREET, R. BRAZLE, L. L. GARVIN,

Petitioners,

v.

THE NORTH SHORE CORPORATION,

Respondent.

BRIEF ON BEHALF OF RESPONDENT, THE NORTH SHORE CORPORATION

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INDEX

	PAGE
Opinions Below	1
Jurisdiction Involved	1
Questions Presented	2
Statement	2
ARGUMENT	
POINT I—The petitioners are not engaged in interstate commerce and are, therefore, not entitled to the benefits of the Fair Labor Standards Act	4
A—In regulating the wages of employees engaged "in commerce" (as distinguished from employees engaged "in the production of goods for commerce") Congress did not intend to regulate the wages of employees engaged, not in commerce, but simply in occupations affecting, related to or necessary to commerce	5
(1) The Fair Labor Standards Act	5
(2) Legislative History	8
B—The petitioners are not engaged in interstate commerce or transportation	10
POINT II—Answering the briefs of petitioners and the administrator	23
A—The Petitioners' Brief	23
B—The Brief on Behalf of the Administrator	26
Conclusion	32
Appendix A	33
Appendix B	35

PAGE

Atkocus v. Terker, 4 Labor Cases 60,724 (Municipal Court of The City of New York) 24
Atlantic Co. v. Walling, 5 Wage Hour Rept. 6 Labor Cases 61,150 (C. C. A. 5) 31

Bartholome v. Balt. Fire Patrol & Despatch Co., 6 Wage Hour Rept. 21 ..... 19, 30

C. C. C. & St. L. Ry. v. Dettlebach, 239 U. S. 588 25
Chicago Board of Trade v. Olsen, 262 U. S. 1..... 27
Chicago & E. I. R. Co. v. Industrial Commission of Illinois, 284 U. S. 296 ..... 20, 29
Chicago & N. W. Ry. Co. v. Bolle, 284 U. S. 74, 79.. 20, 29
Clarksburg & Columbus Short Route Bridge Co. v. Woodring, 89 Fed. (2d) 788, 794 26
Cochran v. Florida Nat. Bldg. Corporation, 45 F. Supp. 830 ..... 19, 23, 30
Com. v. Wilkinson, 16 Pick. 175, 26 Am. Dec. 654 12
Craig v. People, 47 Ill. 487 12
Cudahy Packing Co. v. Holland, 315 U. S. 57 .... 8, 9, 25, 29

Detroit International Bridge Company v. Corporation Tax Appeal Board of the State of Michigan, 294 U. S. 83 ..... 17, 18, 19, 22, 27

Eddings v. Southern Dairies, 42 F. Supp. 664, 669.. 25, 32

Federal Trade Commission v. Bunte Brothers, Inc., 312 U. S. 349 ..... 7, 9, 10, 21, 25, 26
Fleming v. American Stores Co. (E. D. Penn.), 42 F. Supp. 511 30
Fleming v. Capital Broadcasting Co., 4 Wage Hour Rept. 124 31
Fleming v. Hawkeye Pearl Button Co. (C. C. 8) 1940, 113 Fed. (2d) 52, 56 ..... 23, 24
Fleming v. Kull, 4 Wage Hour Rept. 411 (E. D., Texas) 31

Gerdert v. Certified Poultry & Egg Co., 38 F. Supp. 964, 968-9 ..... 25, 31, 32
Gouax v. Bovay, 5 Cir., 105 Fed. 2d, 256, cert. denied 308 U. S. 607 17

Henderson Bridge Co. v. Kentucky, 166 U. S. 150 ..... 16, 17, 18, 19, 20, 27

Illinois Central R. Co. v. Cousins, 241 U. S. 641 20

PAGE

Jax Beer Co. v. Redfern, 124 Fed. (2d) 172, 174 (C. C. A. 5) 31
Jewel Tea Co. v. Williams, 118 Fed. (2d) 202 (C. C. A. 10) 31
Johnson v. Dallas Downtown Development Co., 5 Wage Hour Rept. 984 (decided December 10, 1942, C. C. A., 5) 19, 23, 31
Johnson v. Filstow, Inc. (S. D. Fla., March 1942), 43 Fed. Supp. 930 30
Johnson v. Great National Life Insurance Co. (Texas Civ. App.), 5 Wage Hour Rept. 968 30

Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567 15
Kidd v. Pearson, 128 U. S. 1 6
Kinzell v. Chicago M. & S. P. Ry. Co., 250 U. S. 130 25
Kirschbaum v. Walling, 62 Sup. Ct. 1116 3
Kirschbaum Co. v. Walling, 316 U. S. 517 . . 4, 7, 8, 9, 18, 19, 21, 22, 23, 27, 28

Lake Superior & Miss. R. R. Company v. U. S. 93 U. S. 442 ..... 13, 16, 19, 20, 32
Lofther v. First National Bank of Chicago, 6 Labor Cases 61, 259 ..... 19, 30
Lorenzetti v. American Trust Co., 45 F. Supp. 128 (N. D. Calif.) 30

Mortensen v. Western Light & Telephone Co., 42 F. Supp. 319 31

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 6
New York, Lake Erie & Western R. R. Co. v. Pennsylvania Railroad Co., 158 U. S. 431 15

Overnight Motor Trans. Co. v. Missel, 316 U. S. 572 28

Pedersen v. Del. Lack. & West. R. R. Co., 229 U. S. 146 ..... 20, 21, 22
Pedersen v. Fitzgerald Construction Co., 288 N. Y. 211 (Memo.) affirming without opinion 262 App. Div. 665; Cert. Applied for Sept. 14, 1942, Docket No. 396 ..... 22, 24, 26, 30
People v. Hudson River Connecting Railroad Corporation, 228 N. Y. 203, certiorari denied 254 U. S. 631 24

PAGE

Rader v. Baltimore & O. R. Co., 108 Fed. 2d 980, C. C. A. 7 20

Sou. Ry. v. Prescott, 240 U. S. 632 25
Spinner v. Waterways Fuel & Dock Co., 41 N. E. (2d) 144 (Ohio Ct. App.) 31
Stafford v. Wallace, 258 U. S. 495 27
Steger v. Beard & Stone Electric Co., 4 Wage Hour Rept. 411, 4 Labor Cases 60,643 31
Stoike v. First National Bank of the City of New York, 5 Wage Hour Rept. 560, 264 App. Div. 585 30
Swift & Company v. Wilkerson, 124 Fed. (2d) 176 (C. C. A. 5) 31

Tate v. Empire Bldg. Corp., 5 Labor Cases 61,089 ..... 19, 30

United Mine Workers v. Coronado Coal Company, 259 U. S. 344 6
United States v. Darby, 312 U. S. 100 ..... 21, 23, 27
U. S. v. Knight, 156 U. S. 1 6

Virginia Canon Toll Road Co. v. Colorado, 37 L. R. A. 711 12
Virginia Canon Toll Road Co. v. People, ex rel. Vivian, 22 Colo. 429, 37 L. R. A. 711 12

Walling v. Goldblatt Bros., 128 Fed. (2d) 778, 781 .. 25, 32
Walling v. Helena-Glendale Ferry Co., 5 Wage Hour Rept. 320 31
Walling v. Jacksonville Paper Company No. 336, this Term 28
Walling v. Mutual Wholesale Food & Supply Co., 46 F. Supp. 939, 945 (D. C. Minn.) 32
Warren-Bradshaw Drilling Co. v. Hall, decided by this Court at term (No. 21) 23
Wickard et al v. Filburn (No. 59, this Term), 63 S. Ct. 82, 89 10
Williams v. Jacksonville Terminal Co., 315 U. S. 386 30
Wood v. Truckee Turnp. Co., 24 Cal. 474 12

STATUTES CITED.

	PAGE
Fair Labor Standards Act, Sec. 3 (b) (j)	5
Florida Statutes, 1941, Sec. 343.18	10
Florida Laws 1925 as amended by Chapter 12464 (No. 659) Florida Laws 1927	12
Amendment of August 11, 1913 to Employers Liability Act, 53 Stat. 1404	22
Interstate Commerce Act, U. S. C. A., Title 49, Sec. 1, sub. 3	25
Federal Employers Liability Act (35 Stat. 65, U. S. C. A., Sec. 51)	29
Excerpts from Fair Labor Standards Act of 1938. 52 Stat. 1060, U. S. Code Tit. 29, Secs. 201-219	33, 34

MISCELLANEOUS.

83rd Cong. Rec., 75th Cong., 3rd Sess., Part 8, pp. 9175, 9169	6
Hulbert's "Historic Highways", Vol. 11, pages 103-104	10
Hulbert's "Historic Highways", Vol. 11, pages 45, 62	11
Funk & Wagnall's New Standard Dictionary	11
Hulbert's "Historic Highways," Vol. 11, page 67	11
Loree, Railroad Freight Transportation, 1922, page 134	13
2 Waterman Corp. § 419	12
Ang. & A. Priv. Corp. § 4	12

Supreme Court of the United States

OCTOBER TERM 1942

No. 284

H. T. OVERSTREET, R. BRAZLE, L. L. GARVIN,

Petitioners,

v.

THE NORTH SHORE CORPORATION,

Respondent.

BRIEF ON BEHALF OF RESPONDENT, NORTH SHORE CORPORATION

Opinions Below

The opinion of the District Court (R. 8-10) is reported in 43 F. Supp. 445. The opinion of the Circuit Court of Appeals (R. 11-13) is reported in 128 F. (2d) 450.

Jurisdiction Involved

This Court has already exercised its jurisdiction under U. S. Code Tit. 28, Sec. 347 (a) to review the instant case, by entering, on October 12, 1942, its order granting a writ of certiorari to the Circuit Court of Appeals for the 5th Circuit (R. 13).

Questions Presented

Whether employees of a corporation who are engaged in the maintenance and operation of a toll road located wholly within a state, but over which some interstate traffic passes, are engaged in interstate commerce, and as such are subject to the provisions of the Fair Labor Standards Act.

Statement

The case is before this court as a result of the granting of a motion to dismiss the complaint (R. 8). The facts set forth in the complaint must, therefore, for the purposes of this appeal, be accepted by respondent, and we have no quarrel with the statement thereof made by petitioners or the Administrator.

For the convenience of the court, there is set forth in Appendix B a replica of a map of the road in question taken from "Toll Roads in the United States as of December 31, 1940" published by Federal Works Agency, Public Roads Administration. It will be observed that while respondents' road connects at one end with United States Route 17 as the latter approaches Jacksonville, Florida, it does not connect with any road at the other end. In other words, it is a dead end road. It affords a means of communication with Fort George Island by means of the draw bridge which it operates. In the 1940 Federal Census the population of "Prec. 37, Fort George", Duval County, Florida, was 98.

In accepting the facts stated in the complaint with respect to the amount of interstate as distinguished from intrastate traffic passing over the road, we reserve the right to dispute those facts in the event that a trial of this case on the merits should be necessary, and also to

argue that the amount of interstate traffic over the road comes within the *de minimis* principle or in any event is less than twenty per cent of the entire traffic.[1]

---

[1] The figure of twenty per cent is suggested by reason of the following release of the U. S. Department of Labor, dated October 17, 1942:

"Questions have been raised concerning the application of the Fair Labor Standards Act to maintenance employees working in office buildings in which no goods are produced for interstate commerce and in which none of the tenants there engages in transactions in interstate commerce.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, U. S. Department of Labor, explained today that the Division would consider the Act inapplicable to maintenance employees in these situations, since it is unlikely that the courts would find such employees within the scope of the Act. Typical questions involved relate to those office buildings in which some companies rent space to house part of their clerical or office staffs, but which conduct their production and commercial activities elsewhere. In the opinion of the Wage and House Division such buildings are not in interstate commerce and so not covered.

Last June the Supreme Court in *Kirschbaum* v. *Walling*, 62 Sup. Ct. 1116, held that maintenance employees of a loft building in which the tenants produced goods for interstate commerce are covered by the Act. The Division has held that maintenance employees in buildings in which the tenants carry on interstate commerce activities are similarly covered by the Wage and Hour Act. For purposes of enforcement the Administrator has adopted the rule that he would regard 20 per cent as the test of whether a substantial part of the building is devoted to interstate commerce activities. If less than 20 per cent of the building is occupied by tenants therein engaged in interstate commerce or in the production of goods for interstate commerce, the Division will take no action to apply the Act to the maintenance employees."

ARGUMENT

POINT I

The petitioners are not engaged in interstate commerce and are, therefore, not entitled to the benefits of the Fair Labor Standards Act.

At the outset, we wish to emphasize that no question of power is raised in this brief. Cases involving power are cited herein, but the purpose is not to support a denial of the power of Congress to regulate the wages of employees engaged in the operation and maintenance of privately owned toll roads or bridges, but in support of other points of law decided therein.

This case involves solely the construction of the Act and the question of law as to whether the employees in question are engaged in interstate commerce.

In petitioners' brief, the Court is asked to adopt a "liberal" construction. We suggest that the case does not involve the choice between a so-called liberal and strict construction. The problem is to ascertain the intent of Congress, and that intent can be readily determined from an examination of the Act itself, and its legislative history. The method of approach in cases involving the extent of the coverage of this Act contemplated by Congress was formulated by this Court in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517.

Applicable sections of the Act are set forth in Appendix A.

A

In regulating the wages of employees engaged "in commerce" (as distinguished from employees engaged "in the production of goods for commerce") Congress did not intend to regulate wages of employees engaged, not in commerce, but simply in occupations affecting, related to, or necessary to commerce.

(1) *The Fair Labor Standards Act.*

At the outset there should be noted the two great divisions of the Act. It regulates the wages and hours of employees engaged (1) "in commerce", and also (2) "in the production of goods for commerce" (Sections 6 and 7). The duality of the statutory scheme is carried out by identical language in other provisions such as those dealing with Industry Committees (Section 5), Wage Orders (Section 8), and in the statement of policy (Section 2). It is also carried out in the definitions (Section 3):

> "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

> "(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Trade, transportation, transmission, and communication had, long prior to the passage of the Act, been included in the legal definition of commerce. On the other hand production, manufacturing and mining had, prior to the passage of the Act, been held not in themselves to consti-

tute interstate commerce. *Kidd* v. *Pearson*, 128 U. S. 1; *U. S.* v. *Knight*, 156 U. S. 1; *United Mine Workers* v. *Coronado Coal Company*, 259 U. S. 344. But the power, by appropriate legislation, to regulate activities in such industries because of their affecting commerce had been sustained. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.[2]

The obvious scheme of the Act, therefore, as indicated by the continued use of the dual expressions "in commerce" and "in the production of goods for commerce" and by the separate definitions of "commerce" and "produced", respectively, was to cover employees engaged (1) in what hitherto had been defined as interstate commerce and (2) in certain occupations particularly mentioned not theretofore recognized as themselves constituting interstate commerce, *i. e.*, the occupations specified in the definition of "produced." The latter group was undoubtedly included upon the theory that although such employees were not engaged in commerce, the payment of sub-standard wages to them would injuriously affect commerce. This is borne out by the finding and declaration of policy contained in Section 2.

Under its power to regulate, Congress could unquestionably have included occupations and industries "affecting" commerce other than those in fact included in its definition of "produced". That it did not do so is significant. It emphasizes the inescapable conclusion from the language used that Congress did not intend to extend the benefits of the Act to employees who are not engaged in commerce, but simply in occupations "affecting", "related to", or "necessary to", commerce except in instances

[2] This case was decided prior to the passage of the Fair Labor Standards Act and was referred to in the Senate Debate on the Conference Agreement as having been considered by the Conference Committee which formulated the bill which was finally passed. 83rd Cong. Rec., 75th Cong., 3rd Sess., Part 8, pp. 9175, 9169.

where such latter occupations are specifically set forth in the Act. It would be incongruous for Congress specifically to have included production, manufacturing, and mining, as it did, upon the theory that they "affect" commerce and at the same time to have had the concealed, unexpressed intention of including other occupations and industries which, like manufacturing and mining, do not constitute interstate commerce, but which might properly be held substantially to affect, or to be closely related to, interstate commerce, and as such subject to regulation. As this Court has pointed out, the history of Congressional regulatory legislation warrants the opposite assumption, for it justifies the generalization that in matters of this kind "* * * those charged with the duty of legislation are reasonably explicit." *Kirschbaum* v. *Walling*, *supra*; *Federal Trade Commission* v. *Bunte*, 312 U. S. 349.

The point is further illustrated by the inclusion, in the definition of "produced", of the statement that an employee shall be deemed to be engaged in the production of goods if such employee is employed "in any process or occupation necessary to the production thereof". Here Congress in its regulatory scheme went beyond production itself and specifically included occupations "necessary to" production, indicating an intent, in this field, to extend its regulatory power to extreme limits, if not to exhaust it. But the definition of "commerce," as distinguished from "produced," does not indicate any such intention. Commerce is said to mean "trade, commerce, transportation, transmission or communication," but not "any occupation necessary to" trade, commerce, transportation, transmission or communication.

Where Congress has sought to regulate activities, whether in intrastate or in interstate commerce, it is of course the province of this Court to determine its power to do so. But where, as here, Congress has admittedly acted within its power, the problem before this Court is

simply to determine the field which Congress has entered, and in doing that, primary resort must be had to the structure of the Act and the language used. Here the omission of "occupation necessary to" in the definition of "commerce" and its inclusion in the definition of "produced" is unmistakable evidence of an intent not to include "related" occupations in the definition of "commerce", even though such related occupations may "affect" or be "necessary to" commerce itself. (See *Cudahy Packing Co.* v. *Holland*, 315 U. S. 57, in which this Court, construing certain other provisions of this Act, said: "Because of these differences, it seems to us fairly inferable that the grant of authority to delegate the power of inspection, and the omission of authority to delegate the subpoena power, show a legislative intention to withhold the latter.")

(2) *Legislative History.*

The legislative history of this Act was presented to this Court in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, and it said:

> "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce.' See H. Rep. No. 2182, 75th Cong. 3rd Sess., p. 2; 83 Cong. Rec. 7749-50. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce.' H. Rep. No. 2738, 75th Cong. 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158, 9266-67."

The reason why Congress chose to withdraw from its proposed regulation, except with respect to production, employers engaged "in any industry affecting commerce" is not known. The proceedings of the Conference Committee are not available. No explanation was given by any of the conferees in either the Senate or the House debates

on their Report. But the significance of what the conferees did and what Congress did in enacting the Conference bill instead of the original House bill should not be, and has not been, overlooked by this Court.[3] The action taken discloses a clear intent not to include employees engaged "in any industry affecting commerce", except those engaged in the production of goods for commerce and included in the definition of "produced".

It being clear that it was not the intent of Congress to include within the definition of "commerce" employees engaged in occupations "affecting" or "necessary to" commerce, the question in this case is narrowed down to whether the employees here involved were engaged in "commerce" as defined in the Act, and as that definition must be construed. Before taking up the question, however, may we point out that, while the decision in *Kirschbaum & Co. v. Walling, supra*, furnishes the method of approach in construing the Act, the case itself is otherwise not in point. It dealt with maintenance employees of loft buildings in which goods were being produced for commerce. Those employees were held to come within the language of Subdivision (j) of Section 3 defining "produced", and including employees employed in any "occupation necessary to the production thereof". The employees were therefor held to be engaged "in production of goods for commerce", but *not*, "in commerce".

The employees involved in this case have no connection at all with production. Their occupation is at most related to that phase of commerce incorporated in the term "transportation", which in turn is included in the definition of "commerce".

---

[3] *Kirschbaum* v. *Walling, supra*; *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349. See also *Cudahy Packing Co.* v. *Holland, supra*, wherein it was said: "Nor can we assume * * * that it is any part of the judicial function to restore to the Act what Congress has taken out of it."

B

The petitioners are not engaged in interstate commerce or transportation.

Needless to say these petitioners are not engaged in commerce in the sense of buying and selling. The question is whether they are engaged in that form of interstate commerce, known before the Act as, and specified within the definition of commerce in the Act, as "transportation". Petitioners do not claim that any branch of commerce other than transportation is involved.

The distinction between the maintenance and operation of a highway and the carriage of goods and persons over the highway would seem to be fundamental. All that the maintenance man does is to facilitate, make easy, smooth the path of the traveler engaged in commerce, or the carrier transporting goods or persons. "The one occupation is essentially local," the other may involve interstate activity.

"That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it." *Wickard et al.* v. *Filburn* (No. 99, this Term), 63 S. Ct. 82, 89. See also *Federal Trade Commission* v. *Bunte Brothers, Inc.*, *supra*, at p. 351.

In France, the corvée, or required work on the roads, has been given as one of the minor causes of the social unrest leading to the Revolution. In this country, roadwork has apparently been more palatable, judging by an anonymous jingle, date unknown, but prior to 1905.

> "Oh, our life was tough and tearful, and its toil was often fearful,
> And often we grew faint beneath the load.
> But there came a glad vacation and a sweet alleviation,
> When we used to work our tax out on the road.
> When we used to work our tax out, then we felt the joys of leisure,
> And we felt no more the prick of labor's goad;
> Then we shared the golden treasure of sweet rest in fullest measure,
> When we used to work our tax out on the *road*".

Hulbert's "Historic Highways", Vol. 11, pp. 103-104. The taxes worked out were undoubtedly *local* taxes. At the present time such a statute is in effect in Florida. Florida Statutes, 1941, Sec. 343.18.

Historically the two have in fact been separate and distinct. In the main, the construction and maintenance of the highways has been a sovereign function, exercised by the state, or by counties or by towns, political subdivisions thereof, or in more recent years by the Federal Government. On the other hand, the carriage of goods and persons over the highways has been essentially a private function, effected in earlier times by wagoners[5] and draymen, more recently by trucking and bus companies. When the latter become common carriers, they are, of course, subject to certain special principles of common law, and those engaged in transportation have been subject to state and federal regulations, but, in the main, the business of carriage over the highway has been a private function. In the development of the country, therefore, generally speaking, the sovereign,[6] whether Federal or State, has maintained the highways, and the citizens have transported goods and persons over them.

The heyday of the toll road or turnpike was in the early part of the last century[7]. As commerce and travel increased from south to north and, more particularly, from east to west, the demand for better roads grew faster than the financial ability of the states to supply it. Toll roads and turnpike companies were organized which constructed and maintained improved roads.[8]

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[5] Hulbert's "Historic Highways", Vol. 11, pp. 45, 62.

[6] "In English history, highway designated the main public road, which was the subject of special royal enactments controlling the policing thereof; it was popularly known as the *King's highway*." Funk & Wagnall's New Standard Dictionary.

[7] Hulbert's "Historic Highways, Vol. 11, page 67.

[8] "The stagecoach heralded the new age of road-building, but these new macadamized roads were few and far between; many roadways were widened and graded by states or counties, but they remained dirt roads; a few plank roads were built. The vast number of roads of better grade were built by one of the host of road and turnpike companies which sprang up in the first half of the nineteenth century." (Hulbert Historic Highways, Vol. 11, p. 67.) Most famous of these toll roads was Lancaster Turnpike, running from Philadelphia to Lancaster, the rise and decline of which is described in the same volume, pp. 73 *et seq.*

Tolls were charged, not for the transportation of persons or property by the companies, but for the use of the improved roads.[9] These companies maintained facilities for those engaged in transportation and commerce, but their function was regarded as sovereign, they received franchises from the state and were regarded as operating under delegated sovereign power.[10]

In furnishing facilities for and purveying to those engaged in the carriage of goods and persons, these companies were not unlike the innkeepers and blacksmiths of old and the filling stations and tourists camps of to-day.

With the advent of the railroad there came about the anomaly, not always appreciated, of the combination into one entity of the sovereign function of constructing and

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[9] Note to *Virginia Canon Toll Road Co.* v. *Colorado*, 37 L. R. A. 711.

[10] "A toll road is a public highway, differing from ordinary public highways chiefly in this: that the cost of its construction in the first instance is borne by individuals, or by a corporation, having authority from the state to build it, and, further, in the right of the public to use the road after its completion, subject only to the payment of toll. The acceptance by the corporation of the franchise to construct the road, and the operation thereof, constitute a dedication of the same as a public highway. The right of a corporation or of an individual to exact tolls is not of common right, and, in this country, does not exist in the absence of a grant from the legislature. This power of collecting tolls is a part of the sovereign power of the state, which the legislature may delegate in return for a supposed public good, and the grant of the power may be conferred with any restrictions which the legislature may see fit to impose, and the grantee takes subject to all such limitations; and the grant of the right is the equivalent of, or compensation for, the cost of building and maintaining the road. 2 Waterman, Corp. § 419; Ang. & A. Priv. Corp. § 4; *Com.* v. *Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654; *Wood* v. *Truckee Turnp. Co.*, 24 Cal. 474; *Craig* v. *People*, 47 Ill. 487." (*Virginia Canon Toll Road Co.* v. *People, ex rel. Vivian*, 22 Colo. 429, 37 L. R. A. 711.)

Respondent herein, The North Shore Corporation, operates under franchise granted pursuant to Chapter 10490 (No. 468), Florida Laws 1925 as amended by Chapter 12464 (No. 659) Florida Laws 1927.

maintaining the road and the private function of transporting goods and persons. In the railroad companies themselves, the distinction is preserved in their departmentalized organization. The function of the Maintenance of Way Department which maintains the roadbed is in practice quite separate from the Operating Department, which runs the trains.[11]

But the combining of the two functions in single corporations has at times led some courts and others to lose sight of the essential difference between them. However, not always, and not by this Court in *Lake Superior & Miss. R. R. Company* v. *U. S.*, 93 U. S. 442, decided in 1876. This case involved one of the land grant railroads which had received federal lands with the proviso that

> "said railroad shall be, and remain, a public highway for the use of the government of the United States, free from all toll or other charge for [upon] the transporation of any property or troops of the United States."

Relying on this clause, the Government demanded that the company transport troops for nothing. The company contended that the clause simply meant that the government could use the highway without charge, but that it would have to transport its troops over the highway itself, furnishing equipment and power. In sustaining the latter contention, this Court said (Italics ours):

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[11] "The very fact that the operation of a railroad presents three distinct phases compels specialization in the conduct of these phases; departmentalism arises from specialization. For maintenance of way, maintenance of equipment, and conducting transportation there must be three sets of employees. The work of the employees of each set must be directed by an officer expert in that kind of work. There must be an engineer maintenance of way, a master mechanic, a train master. Here are the terms of the engineering department, the department of rolling equipment, and the department of transportation." Loree, Railroad Freight Transportation, 1922, page 134. See also id. page 3.

"It is somewhat singular that a provision apparently so simple in its terms should give rise to such a wide difference of opinion as to its true construction. The difficulty arises from the peculiar character of a railway as a means of public travel and transportation. The case of a turnpike or a canal would have furnished no difficulty whatever. *Those thoroughfares are usually constructed and owned by companies who have nothing to do with transportation thereon. They merely furnish the thoroughfare.* Had the provision in question related to public works of this kind, it would have been clear that the right reserved to the Government would have been merely the right to use the works themselves (the turnpike or the canal) free from toll. The words 'free from all toll or other charge for the transportation of property or troops' would have referred, by necessary implication, to transportation performed by the government itself, either in its own carriages or vessels, or in carriages or vessels procured and employed at its expense. No one would imagine for a moment that the turnpike or canal company would be bound to furnish the means of transportation, much less the propelling power and labor for performing it."

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"We know, as well as we know the sense of any phrase in the English language which has a historical meaning and application, what is meant when a railroad is spoken of in a law as a 'public highway'. We know that it refers to the immovable structure stretching across the country, graded and railed for the use of the locomotive and its train of cars.

But it is not alone in charters which contemplate the creation of railroads as public highways that we find evidence of *the understood distinction between railroads as mere thoroughfares, and the operations to be carried on upon them by means of locomotives and cars.* This is manifest from the fact, amongst other things, that express power is invariably given (if intended to be conferred) to the railroad company to equip its road, and to transport goods and passengers thereon and charge compensation therefor. This practice evidently springs from the conviction that a

railroad company is not necessarily a transportation company, and that, to make it such, express authority must be given for that purpose, in compliance with the rule that no power is conferred upon a corporation which is not given expressly or by clear implication."

The distinction between the two functions was again recognized by this Court in *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania Railroad Co.*, 158 U. S. 431. In that case a corporation owned a railroad wholly within the State of Pennsylvania, which it leased to another railroad which operated trains moving in interstate commerce. The question was whether the State of Pennsylvania could validly impose taxes on the tolls paid by the one company to the other for the use of the railroad. In sustaining the tax, this Court said (p. 438):

"The tax complained of is not laid on the transportation of the subjects of interstate commerce, or on receipts derived therefrom, or on the occupation or business of carrying it on. It is a tax laid upon the corporation on account of its property in a railroad, and which tax is measured by a reference to the tolls received."

In *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 Fed. 567, an incorporated bridge company, brought a proceeding to compel a common carrier to establish connections with it. One of the questions raised was whether the petitioner was a common carrier of interstate commerce so as to enable it to claim the benefit of certain provisions of the Interstate Commerce Act. In holding that it was not, the Court said (at p. 616):

"The distinction between such an incorporated bridge or highway, established and maintained for use by common carriers and others, upon paying compensation for such use in the way of 'tolls', however graduated, and that of an incorporated common carrier engaged in transporting property for hire, is well defined. It is

pointed out and illustrated in the case of *Boyle* v. *Railroad Co.*, 54 Pa. St. 310, and *Railroad Co.* v. *U. S.* 93, U. S. 442-445."

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The powers and franchises conferred upon petitioner find their legitimate scope and operation in the building, operating and maintaining of its bridge and approaches thereto, for the public purposes it was intended to subserve—that of furnishing and forming a highway over which common carriers and others should have the right or privilege of transporting goods or passing, as they pass over a turnpike, a canal, or a ferry, upon paying reasonable tolls for the use of the structure or thoroughfare; and do not in any way constitute petitioner a common carrier of goods, authorized to equip its road, or to charge compensation for transporting goods on or over the same" (p. 616).

Even in the case of railroad companies, therefor, this Court has thus recognized the separate function of ownership and maintenance of the road, which it has likened to the function of toll road or turnpike companies (*Lake Superior & Miss. S. R. R. Co.* v. *U. S.*, *supra*) and the business of carrying goods and passengers over the road—"the transportation phase."

In so far as bridge companies are concerned there has never been any question but that the business of owning and operating a toll bridge over a navigable water over which interstate traffic may pass is not interstate commerce.

In *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, the company owned and operated a bridge across the Ohio River between Kentucky and Indiana, and levied tolls on traffic passing over it. The Commonwealth of Kentucky sought to collect a franchise tax which was resisted upon the ground that it was a tax on the carrying on of interstate commerce. In sustaining the tax, this Court said (p. 153):

"Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because

the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge."

In 1934, almost forty years later, the same question again came before this Court in *Detroit International Bridge Company* v. *Corporation Tax Appeal Board of the State of Michigan*, 294 U. S. 83, the only difference being that this time the Court was called upon to determine whether the Bridge Company was engaged in foreign commerce because it operated a bridge between Michigan and Canada. A state tax upon the franchise was resisted upon the ground that "the only power it [the Corporation] has is to engage exclusively in foreign commerce", and that to tax the privilege of doing this would burden such commerce and offend the Federal Constitution. The lower courts sustained the tax. This Court stated:

"The argument for reversal is, of course, ineffective if ownership and operation of the bridge do not constitute foreign commerce."

After discussing and quoting the statement in the *Henderson Bridge Company case*, *supra*, that the bridge company did not carry on an interstate business, but that that business was carried on by those using the bridge and paying tolls for the privilege, this Court said:

"We find no adequate reason for departing from the view so expressed. The judgment of the Court below must be affirmed."

Perhaps the most recent case emphasizing the distinction is *Gouax* v. *Boyay*, 5 Cir., 105 Fed. 2d, 256, cert. denied 308 U. S. 607, wherein reimbursement was sought for tolls paid to a Bridge Company for passage over the bridge of troops and munitions of the Government. The Court said:

"A bridge connecting one State with another is an instrumentality of interstate commerce, and the use

of it and the charges or tolls demanded Congress may regulate. Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, 14 S. Ct. 1087, 38 L. Ed. 962. A bridge which crosses a navigable water, although wholly within a single State, may be an obstruction to navigation, and its construction and use may for this reason be regulated by Congress, though interstate commerce be not involved."

. . . . . .

"The Bridge Company does not *transmit* or *transport* these [troops and munitions across the bridge], but merely permits the *transit* of them." (Matter in brackets ours.)

The authorities cited, and particularly the *Henderson Bridge Company* and *Detroit Bridge Company* cases in this Court, establish (1) that the function of ownership, maintenance and operation of a bridge or a highway is separate and distinct from the function of carrying persons or goods over the same, and (2) that the business of a corporation maintaining and operating such a bridge or highway is not interstate commerce even though the traffic passing over the same may be interstate traffic.

A corporation is a legal entity, a fictitious person. Of necessity it must carry on its business through agents or employees. If, therefore, the business of a corporation, in its entirety, is not, in law, interstate commerce, then it *must* follow, inevitably, that no one of the employees carrying on such business can be engaged in such commerce. The sum of the parts cannot be greater than the whole. If the whole business is not interstate commerce then no part of that business carried on by an employee can be such commerce.

We appreciate that the test under the act is not necessarily the business of the employer, but the occupation of the employee, and also that the argument was made in *Kirschbaum* v. *Walling, supra*, that the business of maintaining a building was a local business and hence that

none of the employees could be engaged in interstate commerce. But, in that case this Court found that the business of the employer was *pro tanto* a business necessary to the production of goods for commerce.[12] In this case, however, it is submitted, no such finding can be made because this Court has definitely ruled that the business of an employer such as respondent is not interstate commerce. It has said that companies such as respondent "have nothing to do with transportation" over the roads maintained by them, and it has held that they do not transact an interstate business. (*Lake Superior & Miss. S. R. R. Co.* v. *U. S.*, *supra*, and *Henderson Bridge Co.* v. *Kentucky*, *supra*.)

It is argued by the petitioners and the Administrator that the *Henderson Bridge Company* and the *Detroit Bridge* cases are inapplicable because they were tax cases. If we were questioning the power of Congress to regulate the activities of Bridge Companies the argument might be valid, for the power of a State to tax does not necessarily preclude the power of Congress to regulate. The two are not mutually exclusive. But here there is no question of power. The question is whether or not the business is interstate commerce, and that is the precise question decided by this Court in the *Henderson Bridge* and the *Detroit Bridge* cases. In those cases the tax was attacked as a burden upon the interstate or foreign commerce claimed to be conducted by the corporation. The court did not decide that the tax was not a burden on the commerce. What it decided was that the business was not interstate commerce. and having so decided the attack

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[12] For a discussion of this question in lower courts since the *Kirschbaum* case see *Johnson* v. *Dallas Downtown Development Co.*, 5 Wage Hour Rept. 984 (decided December 10, 1942, C. C. A. 5); *Cochran* v. *Florida Nat. Bldg. Corporation*, 45 F. Supp. 830; *Bartholome* v. *Balt. Fire Patrol & Despatch Co.*, 6 Wage Hour Rept. 21; *Lofther* v. *First National Bank of Chicago*, 6 Labor Cases 61,259; see also *Tate* v. *Empire Bldg. Corp.*, 5 Labor Cases 61,089.

upon the tax necessarily fell. There was no interstate commerce to be burdened. The cases therefore are definitely in point and should be decisive of this case.

The one instance in which this Court may have failed to recognize the distinction between maintenance of a highway and carriage over it is the case of *Pedersen* v. *Del. Lack. & West. R. R. Co.*, 229 U. S. 146, wherein it was held that an employee of a Railroad Company who was carrying bolts to be used in the repair of a bridge over which the Railroad transported interstate traffic, was engaged in commerce within the meaning of the Federal Employers Liability Act. This Court held, three judges dissenting, the work to be "so closely related to such commerce as to be in practice and in legal contemplation a part of it."

We find that in that case neither the *Henderson Bridge Company* case nor *Lake Superior & Miss. R. R. Co.* v. *U. S., supra,* were called to the attention of this Court. Nor was any attempt made to point out the fundamental distinction between the business of maintaining a road and that of carriage over it. In view of the failure to call attention to the combination of the two separate functions in a single corporate entity heretofore referred to it is not strange that the distinction was lost sight of.

Since the *Pedersen* case was decided other cases under the same Act which cited it have been reversed or overruled by the Court, *Chicago & E. I. R. Co.* v. *Industrial Commission of Illinois*, 284 U. S. 296, *Chicago & N. W. Ry. Co.* v. *Bolle*, 284 U. S. 74, 79; *Illinois Central R. Co.* v. *Cousins*, 241 U. S. 641, and it has been questioned whether it is still the law. *Rader* v. *Baltimore & O. R. Co.*, 108 Fed. 2d 980, C. C. A. 7.

In asking this Court to adopt a rule promulgated in construing the Employers' Liability Act that an employee is engaged in transportation where his work is "so closely related to such transportation as to be practically a part of it", the petitioners and the Administrator are demanding

judicial legislation. The very phrase "closely related to" involves an admission that the occupation is not in fact transportation. It is also admitted in the statement of the rule invoked that the occupation is not "actually" a part of transportation but only "practically" a part. This rule affords a typical illustration of that "retrospective expansion of meaning which properly deserves the stigma of judicial legislation" which this Court clearly indicated in *Kirschbaum* v. *Walling, supra,* would not be indulged in in construing the Act here involved.

Here we have unmistakable evidence that Congress did not intend to include occupations "affecting" or "necessary to" commerce, as distinguished from production (*Supra,* Subdivision A). In the face of that affirmative evidence of Congressional intent it would seem to be contrary to the will of Congress for this Court to engraft upon the definition of "commerce" occupations or industries "closely related" thereto. The effect of such an action cannot be foretold. The Employers' Liability Act involves simply corporations engaged in transportation by rail. This Act covers all commerce, including trade, transportation, transmission or communication. What allied industries and occupations might be included within the Act, if this Court construes it to include employees engaged in occupations "closely related to" commerce is difficult to imagine. But, in a matter so grave, if there be doubt about the intent of Congress, we submit that it would be orderly procedure for this Court, having demonstrated the power to regulate (*United States* v. *Darby,* 312 U. S. 100), to leave it to Congress to settle a serious doubt about the extent of the coverage. *Federal Trade Commission* v. *Bunte Bros., supra.*

Furthermore, with all due respect, it is not true that the operation and maintenance of a bridge or highway is so closely related to the transportation over the same as to be, as stated in the *Pedersen* case, in "legal contemplation"

a part of it. Subsequent to that decision, this Court held to the contrary. (*Detroit International Bridge Company* v. *Michigan*, 294 U. S. 83.) The business of owning and operating a toll bridge not being, in law, interstate commerce, it therefore cannot be, in "legal contemplation," part of such commerce.[13]

The Employers Liability Act applies to employees of a railroad corporation engaged in "such commerce", by which is meant the interstate transportation by rail carried on by the employer. In the *Pedersen* case this Court said: "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" The Court thought the employee in that case to be engaged in such commerce because it considered the employees' services indispensable to the commerce in which the employer was engaging. Here the employer is not engaged in commerce at all and no employee who carries on his business can be so engaged. The New York Court of Appeals, in a case under the Fair Labor Standards Act involving an employee repairing a railroad bridge, found no difficulty in sustaining such a distinction of the *Pedersen* case by a lower Court, and held that the employee was not covered by this Act. (*Pedersen* v. *Fitzgerald Construction Co.*, 288 N. Y. 211 (Memo.) affirming without opinion 262 App. Div. 665; Cert. Applied for Sept. 14, 1942, Docket No. 396.)

Counsel for petitioners apologizes for the Courts below because their decisions were rendered prior to the decision of this Court in *Kirschbaum* v. *Walling, supra*. No apology is necessary. As we have pointed out, the decision in that case is not here in point, and since that time both the

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[13] The failure of this Court to include "related" occupations in the coverage of this Act would not have the effect of unsettling the construction of the Employers Liability Act. See the amendment of August 11, 1913 to that Act, 53 Stat. 1404. *Kirschbaum* v. *Walling, supra*.

District Judge in *Cochran* v. *Florida Nat. Bldg. Corporation*, 45 Fed. Sup. 830, and the Circuit Court of Appeals in *Johnson* v. *Dallas Downtown Development Co.*, 5 Wage Hour Rept. 984 (C. C. A. 5), who respectively decided this case have deceided other cases in which this case is held not to be in conflict with the *Kirschbaum* case.

The decision of the Courts below is clearly correct and should be affirmed.

POINT II

Answering the briefs of petitioners and the administrator.

A

The Petitioners' Brief.

Most of the arguments in petitioners' brief have already been disposed of.

On page 9 petitioners quote from a statement of this Court in *United States* v. *Darby, supra* to the effect that the purpose of the present regulation was that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions. Obviously the final test of construction is the language used in the sections, heretofore referred to, containing the actual regulatory provisions, and in the definitions. Were the purpose alone to be considered, we could well argue that regulation of employees of toll roads was not covered by the Act. There is no competition between toll roads, and if there were it is difficult to see how wages and hours paid their employees could have an injurious effect on competitive prices of goods sold in interstate commerce.

Warren-Bradshaw Drilling Co. v. *Hall*, decided by this Court at this term (No. 21) and *Fleming* v. *Hawkeye*

Pearl Buttes Co. (C. C. 8) 1940, 113 Fed. (2d) 52, 56 were cases involving production in which the employees in question were held to be engaged in occupations necessary to production. While counsel concedes this, it is argued that the cases cited exemplify a "liberal construction". What the Courts did was to carry out the intent of Congress in regulating not simply production, but also occupations necessary to production.

On page 11 petitioners cite *Atkocus* v. *Terker*, 4 Labor Cases 60,724 (Municipal Court of The City of New York), in which a watchman employed by a contractor repairing a bridge was held to be within the Act. That case was decided in September 1941. In November 1941 the Appellate Division of the Supreme Court, State of New York, an Appellate Court of that State, decided *Pedersen* v. *J. F. Fitzgerald Construction Company*, 262 App. Div. 665, which is squarely in conflict with *Atkocus* v. *Terker*. The *Pedersen* case was affirmed, without opinion, by the New York Court of Appeals (288 N. Y. 211, Memo.), and an application for a writ of certiorari is pending in this Court. The case cited by respondent does not, therefore, represent the views of the highest court of New York State and must be regarded as having been overruled by it. Furthermore, in the *Atkocus* case there is no discussion at all of the Fair Labor Standards Act: There is simply a quotation from *People* v. *Hudson River Connecting Railroad Corporation*, 228 N. Y. 203, certiorari denied 254 U. S. 631. In the *Hudson River Connecting Railroad Corporation* case Congress had by special act authorized the construction of a bridge over the Hudson River, subject to the approval of the War Department, and by further special act extended the time for such construction. The corporation, created under authority of an act of the New York Legislature to construct the bridge, had at great expense prepared and filed plans which had been approved by the Secretary of War as required by the Federal Acts. Thereafter, the New York State Legislature passed

an act repealing its previous act authorizing the incorporation of the company in question, and in effect prohibited the erection of the bridge whose construction had been authorized by act of Congress and approved by the Secretary of War. The Court of Appeals held the repealing act to be void and refused to enjoin at the instance of the State of New York the construction of the bridge. The mere statement of this case reveals its inapplicability.

On pages 12 and 13 petitioners cite several decisions of this Court construing the Federal Employers Liability Act, including *Kinzell* v. *Chicago M. & S. P. Ry. Co.*, 250 U. S. 130, wherein this Court said that "the doing of work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce within the meaning of the Act."

In suggesting that this test be adopted petitioners are again pleading for judicial legislation. If Congress, in framing the Act, deliberately excluded occupations "affecting" or "necessary to" commerce, there can be no reason to suppose that it intended to include occupations "furthering" such commerce. Nor is it a part of the judicial function "to restore to the Act what Congress has taken out of it." *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 367. Had Congress, in framing the Act, chosen to extend the definition of "Commerce" or "transportation" beyond its ordinary connotation it could have done so.[11]

In all these Employers Liability cases this Court was construing the Employers Liability Act, not the Fair Labor

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[11] Cf. Definition of "transportation" in the Interstate Commerce Act, U.S.C.A., Title 49, Sec. 1, sub. 3 and *C.C.C. & St. L. Ry.* v. *Dettlebach*, 239 U. S. 588 and *Sou. Ry.* v. *Prescott*, 240 U. S. 632. As to definition of "commerce" in this and other acts see discussions in *Federal Trade Commission* v. *Bunte*, 312 U. S. 349, 351; *Walling* v. *Goldblatt Bros.*, 128 Fed. (2d) 778, 781; *Gerdert* v. *Certified Poultry & Egg Co.*, 38 F. Supp. 964, 968-9; *Eddings* v. *Southern Dairies*, 42 F. Supp. 664, 669.

Standards Act. Arbitrarily to engraft that body of law upon the latter Act, which is entirely different in purpose and structure, simply because of some similarity of language in one phrase, would seem to be an unsound procedure and, if adopted, would seem to preclude the courts from ascertaining the intent of Congress by a study of the purpose, the structure, the language used, and the legislative history of the particular act before them. As stated in *Federal Trade Commission* v. *Buntt*, *supra*, at page 353:

> "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system."

The other Employers Liability cases referred to by counsel are disposed of by the foregoing discussion and our comments on the *Pedersen* case, *supra*, page 20.

The reference in petitioners' brief (p. 14) to the Act authorizing the Secretary of War to regulate tolls on bridges crossing navigable waters and the citation of *Clarksburg & Columbus Short Route Bridge Co.* v. *Woodring*, 89 Fed. (2d) 788, 794 is not apropos. The power of Congress to regulate the operation of such bridges is not disputed. The question is, has it been exercised in this case?

B

The Brief on Behalf of the Administrator.

The Administrator first points out that since neither the waterborne commerce on the intercoastal waterway nor the interstate transportation along the toll road could proceed without the performance of petitioners' duties, respondent's business is subject to regulation by Con-

gress; in other words that Congress has power to regulate the activities in question. The question of power is not raised, so the argument falls.

The Administrator then points out that the *Henderson Bridge Company* case and the *Detroit Bridge Company* case do not imply lack of authority to regulate and suggests that in the State tax cases the question involved is whether a particular exercise of state power must be deemed in conflict with the paramount authority of Congress to regulate. We have heretofore pointed out that the particular State tax cases upon which we rely did not turn on this point, but on the question as to whether or not the business of the Companies was or was not interstate commerce.

It is then argued, pages 8 and 9, that the State tax cases do not assist us in ascertaining the coverage of a Federal Statute which embodies independent congressional policies and objectives, and it is suggested in footnote 6 that respondent's business is not less closely related to the "stream of commerce" than the activities involved in the cases of *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 and *Stafford* v. *Wallace*, 258 U. S. 495, both, incidentally, cases involving "power." But in the last page of the brief the Administrator is careful to point out that the "stream of commerce" doctrine is not here applicable.

It is also suggested, page 9, that even if the State tax cases are relevant in determining whether respondent's business is interstate commerce, the coverage of this Act, addressed as it is to the activities of the employees, must be measured by different standards. The standard is whether or not the employees are engaged in interstate commerce (in this particular case interstate transportation). In this particular Act this question has been left by Congress to this Court, *United States* v. *Darby, supra* and *Kirschbaum* v. *Walling, supra*, and this Court has, in decisions above referred to, held that a business such as

that of this employer is not interstate. The occupation of the employees, concededly carrying on parts of the employer's business, cannot be denominated as interstate without involving a determination that the business of the employer is, *pro tanto*, interstate; and such a determination would run counter to settled law.

The suggestion of the Administrator that the "stream of commerce" cases should here apply latitudinally, as well as longitudinally as he has urged in *Walling* v. *Jacksonville Paper Company* No. 336, this Term, would indicate disagreement with the statements of this Court in *Kirschbaum* v. *Walling, supra* that Congress chose not to enter areas which it might have occupied, and with the intimation in that same case that in the absence of reasonably explicit expression by Congress of intent to control, the assumption will not be indulged in of an implied intent to enter fields affecting the duality of our system of government.

Implicit, if not expressed in the brief of the Administrator would seem to be the theory that the term "commerce" in the Act should be construed by this Court to include every activity which may have been held subject to Federal regulatory power under the commerce clause. This alone explains the citation of so many cases involving power in a case involving simply construction.

After discussing and citing Employers Liability Act cases (pp. 10-11), the Administrator intimates that an affirmance would contract the phrase "in commerce" to include only employees physically participating in the movement of goods across state lines. Obviously no such extreme result is contended for. This Court has already held, *Overnight Motor Trans. Co.* v. *Missel*, 316 U. S. 572, that a rate clerk employed by an interstate motor carrier was engaged in commerce. His occupation was directly concerned with charges for the carriage of goods across state lines. That employee was actually engaged in the

transportation business, not in an occupation simply related thereto.

The second sentence on page 12 of the Administrator's brief reads as follows:

> "Nor is there any evidence to indicate that Congress intended that employees who bear a 'necessary' relation to production for commerce—a process once removed from actual commerce—would be covered by the Act while those who bear a considerably closer relation to the primary process of interstate commerce itself would not be covered."

The evidence of the intent of Congress to exclude from the definition of commerce occupations simply "necessary" thereto, is found in the fact of such *exclusion* coupled with the *inclusion* of "necessary" occupations in the definition of "produced" (*Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 364), and also in the legislative history of the Act heretofore referred to.

The Administrator intimates (p. 12) that "commerce" is a broader term than "transportation" and cites *Chicago & N. W. Ry. Co.* v. *Bolle*, 284 U. S. 74, a case under the Federal Employers Liability Act. That Act (35 Stat. 65, U.S.C.A., Sec. 51) applies to common carriers by railroad engaging (1) "in commerce" and imposes liability (2) in favor of persons injured while employed by such carrier "in such commerce". To apply Employers Liability principles here it is necessary to bring the case within (1) before passing smoothly to the consideration of (2), as the Administrator has done. In cases under that Act this Court has held that the only phase of commerce which could possibly have been involved was "transportation" (*Chicago & E. I. R. Co.* v. *Commission*, 284 U. S. 296). Neither the Administrator nor the petitioners have at any time throughout this case suggested that the occupation of the petitioners could be even remotely related to any other phase of commerce than "transportation". This respondent does not engage in transportation.

On page 13 the Administrator calls attention to *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386. There is no question but what the redcap assisting in the movement of passengers and carrying their baggage was engaged in transportation. The only question in that case might have been when the interstate phase of the transportation commenced or was completed.

On page 13 the Administrator cites a number of cases under this Act in the lower Federal courts and in some State courts in support of the proposition that maintenance employees, watchmen and office and clerical workers are covered by the Act. Of these *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (N. D. Calif.), *Stoike* v. *First National Bank of the City of New York*,[15] 5 Wage Hour Rept. 560, 264 App. Div. 585 (appeal to the New York Court of Appeals pending) and *Fleming* v. *American Stores Co.* (E. D. Penn.), 42 F. Supp. 511 involved employees maintaining office buildings in which some of the occupants were engaged in interstate commerce, but not in production. These three cases are contrary to the weight of authority in the District courts and the State courts[16] and to the recent decision of the

---

[15] *Stoike* v. *First National Bank of the City of New York*, *supra*, distinguishes *Pedersen* v. *Fitzgerald Contracting Co.*, referred to *supra*, pages 22, 24, upon the ground that in the latter case the employees were engaged in construction of bridges and not in the repair thereof. The majority opinion of the Appellate Division in the latter case states that the employees were engaged in the "repair of bridge superstructures". The record on appeal in the New York Court of Appeals shows that both questions were raised.

[16] *Lofther* v. *First National Bank of Chicago* (N. D. Ill. October 1942) 6 Labor Cases 61,259; *Cochran* v. *Florida National Bank* (S. D. Fla. July 8, 1942), 45 Fed. Supp. 830; *Tate* v. *Empire Building Co.* (E. D. Tenn. 1942), 5 Wage Hour Rept. 475, 5 Labor Cases 61,089; *Johnson* v. *Great National Life Insurance Co.* (Texas Civ. App.), 5 Wage Hour Rept. 968; *Bartholome* v. *Balt. Fire Patrol & Dispatch Corporation* (D. C. Md.), 6 Wage Hour Rept. 21; *Johnson* v. *Filstow, Inc.* (S. D. Fla., March 1942), 43 Fed. Supp 930.

Circuit Court of Appeals in *Johnson* v. *Dallas Downtown Development Co.* (December 10, 1942, C. C. A. 5), 5 Wage Hour Rept. 984.

Atlantic Co. v. *Walling*, 5 Wage Hour Rept. 6 Labor Cases 61,150 (C. C. A. 5) involved production. In *Mortensen* v. *Western Light & Telephone Co.*, 42 F. Supp. 319 the employee was engaged in the operation of an interstate telephone system. In *Steger* v. *Beard & Stone Electric Co.*, 4 Wage Hour Rept. 411, 4 Labor Cases 60,643 and *Fleming* v. *Kull*, 4 Wage Hour Rept. 411 (E. D., Texas) it does not appear whether commerce or production of goods was involved. The duties of the employee in *Spinner* v. *Waterways Fuel & Dock Co.*, 41 N. E. (2d) 144, (Ohio Ct. App.), included the operation of a digger-boat, the function of which was to load and unload coal moving in interstate commerce. The nature of the employee's occupation in *Fleming* v. *Capital Broadcasting Co.*, 4 Wage Hour Rept. 124 is not disclosed. In *Walling* v. *Helena-Glendale Ferry Co.*, 5 Wage Hour Rept. 320; 5 Labor Cases 60,994 (E. D. Ark.) the employees collected transportation charges for a company operating an interstate ferry or hauled coal burned by the ferry and the ferry was of course engaged in interstate commerce.

Where the question is whether a maintenance employee is engaged "in commerce" as distinguished from the "production of goods for commerce" or occupations "necessary" thereto, the weight of authority in the lower Federal courts and in the State courts is that he is not covered by the Act. The cases cited in footnote 16 establish that the Act does not apply to employees such as petitioners in the case at bar who merely "affect" commerce or are "related" or "necessary" thereto. See also *Jewel Tea Co.* v. *Williams*, 118 Fed. (2d) 202 (C. C. A. 10); *Jax Beer Co.* v. *Redfern*, 124 Fed. (2d) 172, 174 (C. C. A. 5); *Swift & Company* v. *Wilkerson*, 124 Fed. (2d) 176 (C. C. A. 5); *Gerdert* v. *Certified Poultry & Egg Co., Inc.*, 38 F. Supp.

964 (S. D. Fla.); *Eddings* v. *Southern Dairies*, 42 F. Supp. 664 (E. D. S. C.); *Walling* v. *Goldblatt Bros.*, 128 Fed. (2d) 778, 781 (C. C. A. 7); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 46 F. Supp. 939, 945 (D. C. Minn.).

CONCLUSION

It is submitted that the petitioners, engaged in the operation and maintenance of this toll road, are performing a function which historically, in practice and in law has "nothing to do with the transportation thereon", (*Lake Superior and Miss. R. R. Co.* v. *U. S.*, *supra*) and that neither they nor their employer are engaged in interstate commerce. Petitioners and the Administrator seek to overturn a long established historically founded rule of law, and in effect to read into the Act its application to occupations affecting, related to or necessary to commerce, a construction which is not warranted by the language, scheme or structure of the Act within the language of the Act and which has been rejected by Congress.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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January 8, 1943.

APPENDIX A

Excerpts from Fair Labor Standards Act of 1938
52 Stat. 1060, U. S. Code Tit. 29, Secs. 201-219

"Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Sec. 3. As used in this Act—

* * *

(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * *

(j) 'Produced' means produced, manufactured, mind, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * *

Sec. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

* * *

Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * *

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

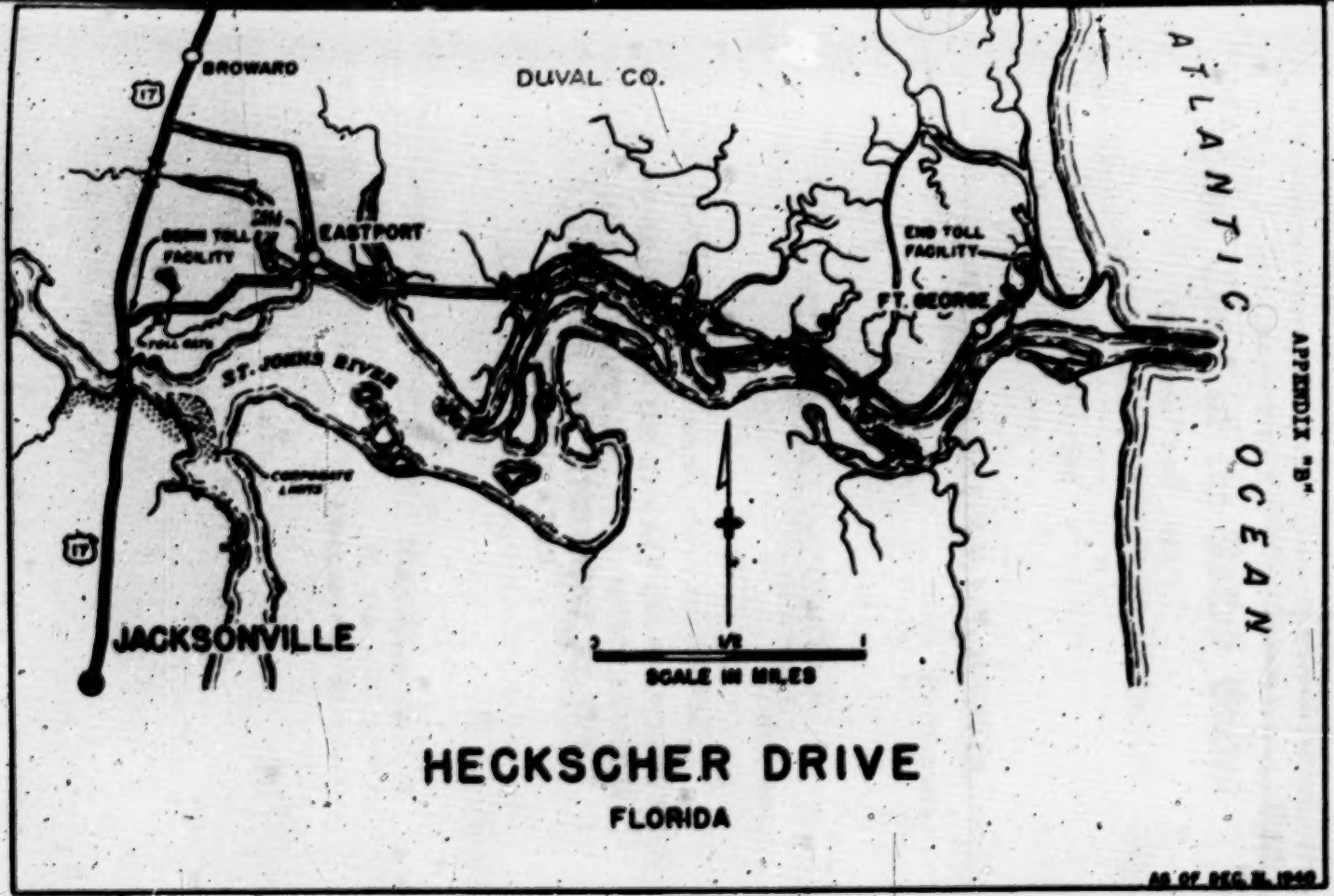
(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein."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Supreme Court of the United States

OCTOBER TERM 1942

No. 284

H. T. OVERSTREET, R. BRAZLE, L. L. GARVIN,
Petitioners,

v.

THE NORTH SHORE CORPORATION,
Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT IN ANSWER TO SUPPLEMENTAL MEMORANDUM SUBMITTED ON THE ARGUMENT BY THE ADMINISTRATOR

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(1)

Permission to submit this brief, was granted on the argument.

The broad statements made by the Administrator are not borne out in his references. The Senate debate on the Conference Agreement opened with the statement of Senator Bailey that "I consider the bill manifestly unconstitutional" (Cong. Rec., Vol. 83, Part 8, p. 9166), the reason given being that commerce did not extend to manufacture and mining. Senator Borah's remark, quoted in Note 1, had reference to power as distinguished from scope of coverage. As to the latter Senator Borah later said, obviously referring to the definition of commerce in the Act (Italics ours, Cong. Rec., Vol. 83, Part 8, p. 9175):

> "We have gone no further than to announce the general principle as to those engaged in interstate

> commerce and if the Court finds, as it must find, pro or con upon the question, the particular case must fall or rise according to whether the Court finds the parties are engaged in interstate commerce. *But we have not extended the rule by the measure itself.* We have said that those employed in interstate commerce are to be covered. The Court must determine whether or not they are employed in interstate commerce."

Senator Wagner's prediction, also quoted in Note 1, was after reference to decisions of this Court construing the National Labor Relations Act. Senator Wagner obviously did not have in mind the difference in coverage of necessity resulting from the different language used in the two Acts (Cf. *Federal Trade Commission* v. *Bunte*, 312 U. S. 349, 351).

Note 2 is cited as authority for references to Employers Liability cases in this Court said to have been made in Congress and in Committee hearings prior to the Conference Agreement.

The first reference is to 83 Cong. Rec., Part 7, p. 7434. On that page, Mr. Randolph quoted from the case of *Santa Cruz Fruit Packing Co.* v. *The National Labor Relations Board*, 303 U. S. 453, which in turn referred to the test under the Employers Liability Act. The discussion at that time was with reference to Section 6 of the House Bill as it then read. The title was "Industries Affecting Commerce" and the section was one conferring upon the Secretary of Labor power to determine the coverage of the Act. 83 Cong. Rec., Part 7, p. 7433.

The second reference is to pages 9170-9172, 83 Cong. Rec., Part 7. This reference is to the Senate debate on the Conference Agreement in which there was reference to the Employers Liability Act and some of the cases of this Court thereunder, but the reference was in the course of a debate upon the constitutionality of this Act.

as shown by the colloquy between Senator Bailey and Senator Borah beginning in the middle of the second column of page 9170. The senators were talking about power, not the extent of coverage contemplated in the Act by the use of the term "engaged in interstate commerce".

We are next referred to the statement in Committee hearings prior to the Conference Agreement. The first reference (pp. 42-43) shows the following:

> "Representative Thomas: Where in the Act is there any yardstick laid down that defines directly 'affecting interstate commerce'?
>
> Mr. Jackson: That is a very difficult thing to define. The courts define it for themselves. They hold some types of railroad labor are in interstate commerce; and other types of railroad labor that are difficult for me to distinguish, the Court thinks are not in interstate commerce because of the effect of their work."

The reference here was to one of the bills which covered occupations "affecting" commerce and is not apropos to the bill as finally passed.

The discussion in the Committee Hearing continued on to the question as to when commerce would begin and when it would end (p. 43) and the following was said:

> "Senator Pepper: Is it not a fact that that same question is already being decided by the courts, now under existing law, where the States have attempted to regulate things which are in interstate commerce, and it is a question whether they come to rest within the State to such a degree that they become divested of their interstate character?
>
> Mr. Jackson: That is right. And it is also being decided in the Employers Liability cases. It is being decided in all these interstate commerce cases, and it is very perplexing to decide what the principle is."

This reference again was to the Act as it then stood, prior to the changes affected by the Conference Agreement.

The next reference given in Note 2 is to page 59 of the minutes of the joint Committee hearings. This consisted of a portion of a statement submitted by Mr. Jackson consisting of a *constitutional* analysis of the bill. It was said:

> "It is already established that the conditions of employment of workers immediately engaged in commerce may be regulated by Federal Law. (*Wilson* v. *New*, 243 U. S. 332; *Virginia Railway Co.* v. *System Federation*, October Term 1936, decided March 29, 1933; *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board*, decided April 12, 1933.)".

Note that nothing here is said about Employers' Liability cases. The statement was discussing power.

Wilson v. *New* involved constitutionality of the Hours of Service Act (34 Stat. 1415, U. S. C. A. Title 45, Sec. 61, *et seq.*). Section 1 of that Act provides that "the term 'employees' as used in this chapter shall be held to mean persons actually engaged in or connected with the movement of any train."

The *Virginia Railway* case involved the Railway Labor Act, 44 Stat. 577, U. S. C. A. Title 45, Sec. 151, *et seq.*, which specifically provides that "the term 'employee' as used herein includes every person in the service of a carrier who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect • • • ."

Washington, Virginia & Maryland Coach Co. v. *National Labor Relations Board* simply held that a coach company engaged in interstate transportation for hire came within the provisions of the National Labor Relations Act.

It is clear that this statement made in the hearing had reference to the power of Congress and was not inserted in an effort to demonstrate that employees engaged in maintenance of facilities or instrumentalities which others use in commerce are themselves engaged in transportation or commerce.

In Note 3 there is quoted a colloquy between Senator Borah and Senator Bailey with reference to railroad systems. If Senator Bailey's position was that every employee in a railroad system comes within the coverage of the Act, then it is directly contrary to the above quoted statement of Senator Borah, one of the conferees, and also to the following statement of Senator Pepper, another conferee, made during the same debate (83 Cong. Rec., Part 8, p. 9168).

> "Mr. Pepper: I think it is vital that we should keep clearly in mind the distinction between what the Senator from North Carolina has suggested and what is in this bill as to the objectives of the bill and its application legally. If the Senator will regard section 6 of the conference report he will find it reads as follows:
>
> > Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates.
>
> And section 7, which deals with maximum hours, reads thus:
>
> > No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> More than the hours specified in the section.

So that the conference committee had before it the question of whether this proposed law should be ap-

plied to all employees of an industry which itself is engaged in interstate commerce although the individual employees may not necessarily themselves be engaged in interstate commerce or whether its application should be applied or made to the employees themselves who were engaged either in interstate commerce or in the production of goods for interstate commerce.

The power to affect those employed in interstate commerce is, I assume, definitely admitted by the Senator from North Carolina. Jurisdiction over employees engaged in the production of goods for interstate commerce is as vital to the exercise of the power to regulate commerce as the source of a river is to the river itself or the origin of a spring to the stream which flows away from it.

I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the committee."

Senator Pepper's clear statement would seem to dispose of any intimation by Senator Bailey, who was opposing the bill, that it might cover every employee of an entire railroad system. The bill covers employees of railroad companies who are engaged in commerce or in production of goods for commerce in the same way that it covers employees of any corporation or employer where such employees are engaged in commerce or in the production of goods for commerce.

On page 3 of the Administrator's Supplemental Memorandum reference is made to a statement made in the House debate on the Conference Agreement by one of the members who served on the Conference Committee. That same

member stated in the course of this same statement (83 Cong. Rec., Part 8, p. 9260):

> "It must be repeated, however, to avoid any misunderstanding of the bill, that it does not in any way, shape, or form affect intrastate or purely local or state business. It covers only interstate commerce; that is, business which is interstate in character."

In the face of these self-contradictions by a House of Representatives member of the Joint Committee, it is submitted that debates in which members of Congress have given their opinion as to the coverage of the Act are not the best evidence of Congressional intention. The best evidence is found in the structure and language of the Act itself, in particular in the inclusion at one point and the exclusion at another of "necessary occupations", and in what Congress did, as distinguished from what some of its members said, prior to the passage of the Act, i. e., in its elimination of the provisions regulating employers "engaged in commerce in any occupation affecting commerce". It is submitted that this action speaks louder than words.

These references to the Employers Liability Act, along with references to the Interstate Commerce Act, The National Labor Relations Act, and many other regulatory acts of Congress and decisions of this Court sustaining or construing the same, which were frequently made at one time or other during the Committee hearings and in the debates in both Houses, principally with relation to the question of constitutionality, go very far from establishing the existence of an intent on the part of Congress, in this carefully drawn Act, preceded by its definite rejection of important amendments, to adopt tests phrased by this Court at various times in varying language in construing the Federal Employers Liability Act. It is very far from

the practice of Congress in recent legislation of being "reasonably explicit" in matters of this kind.

> *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 522;
> *Federal Trade Commission* v. *Bunte*, *supra*, at pages 351, 355.

Had Congress really had in mind the embodying in the Fair Labor Standards Act the formulae employed by this Court in cases under the Employers Liability Act, we would have found elaborate discussions of those various formulae and a discussion of the fundamental difference between the two Acts.

It would have been pointed out in debates and reports that the one Act was for the benefit of employees engaged in the more hazardous phases of railroad maintenance and operation, whereas this Act was intended to be for the benefit of employees engaged generally in interstate commerce or production of goods for interstate commerce without regard to the physical hazards. It would have been pointed out that the test under the Employers Liability Act has been as to whether or not the employee was engaged in transportation at the time of the accident; that the application of that doctrine to the present Act might result in the exclusion of employees who ought fairly to be included and the inclusion of employees not intended to be included; that a test applicable to the employees of one type of corporation, i. e., interstate common carriers by rail, might not be satisfactory when applied to the many other types of businesses intended to be covered in the broad definition of commerce as "trade, commerce, transportation, transmission and communication". For example, if Congress intended to include in the Act maintenance employees of railroads, why include employees repairing the roadbed, and exclude a station agent killed by a passing train while sweeping the platform, as would have to be

done if the Employers Liability test were followed (*Central R. R. of New Jersey* v. *Gasser*, 112 Pa. Super. 420, certiorari denied 293 U. S. 565).

As stated in *Federal Trade Commission* v. *Bunte, supra:*

> "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

(2)

Finally, the Court is asked to follow Interpretive Bulletin No. 5 issued by the Wage and Hour Division (Note 4) which reads, after supplying the omissions in the Administrator's brief:

> "13. Employees of contractors engaged in maintaining, repairing or reconstructing railroads, ships, highways, bridges, pipe lines, navigable waters of the United States, or other essential instrumentalities of interstate or foreign commerce *would seem* to be engaged in interstate commerce and subject to the Act." (Italics ours.)

The theory underlying this ruling is that employees are engaged in interstate commerce because they repair or maintain instrumentalities used by others in interstate commerce. This is a fallacious theory.

There is no magic in the word "instrumentality". Commerce or transportation are conducted by persons, real or, in the case of corporations, fictitious. In the course of the conduct of their commerce or transportation, those persons use things; which things, because of being used by persons in the conduct of their commerce or transportation, are called instrumentalities of commerce. But other and different persons who may be engaged in repairing or maintaining those things are not engaged in commerce or tranportation. They simply facilitate the commerce or

transportation carried on by those engaged in such commerce or transportation and who use the instrumentalities in the actual conduct of their commerce or transportation. That those engaged in the maintenance or repair of such instrumentalities of commerce carried on by others may be subject to the power to regulate commerce, is not here the question. That they are neither engaged in commerce nor in transportation when all they do is to maintain or repair instrumentalities or facilities which other people, in fact engaged in commerce or transportation, make use of, should likewise not be open to question.

Respectfully submitted,

ROSWELL C. P. MAY,
W. GREGORY SMITH,
Counsel for Respondent.

January 13, 1943.

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No. 284

In the Supreme Court of the United States

OCTOBER TERM, 1942

H. T. OVERSTREET, R. BRAZIE, AND L. L. GARVIN,
PETITIONERS
v.
THE NORTH SHORE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Cochran v. *Florida National Bldg. Corp.*, 5 Wage Hour Rept. 576	9
Detroit Bridge Co. v. *Corporation Tax Board*, 294 U. S. 83	9
Fleming v. *American Stores Co.*, 42 F. Supp. 511	9
Fleming v. *Atlantic Co.*, 40 F. Supp. 654	9
Fleming v. *Capital Broadcasting Co.*, 4 Wage Hour Rept. 124	9
Fleming v. *Kull*, 4 Wage Hour Rept. 411	9
Hammer v. *Dagenhart*, 247 U. S. 251	8
Henderson Bridge Co. v. *Kentucky*, 166 U. S. 150	9
Johnson v. *Downtown Development Co.*, 5 Wage Hour Rept. 482	9
Kinsell v. *Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130	7
Kirschbaum v. *Walling*, No. 910, October Term, 1942	8, 10
Lorenzetti v. *American Trust Co.*, 45 F. Supp. 128	8
Louisville & Nashville R. R. Co. v. *Parker*, 242 U. S. 13	6
McGoldrick v. *Berwind-White Co.*, 309 U. S. 33	10
Mortenson v. *Western Light & Telephone Co.*, 42 F. Supp. 319	9
National Labor Relations Board v. *Jones & Laughlin*, 301 U. S. 1	8
New York Central R. R. Co. v. *Carr*, 238 U. S. 260	7
Overnight Motor Transp. Co. v. *Missel*, No. 939, October Term, 1942	8
Philadelphia, B. & W. R. R. Co. v. *Smith*, 250 U. S. 101	6
Philadelphia & Read. Ry. Co. v. *DiDonato*, 256 U. S. 327	6
Pedersen v. *Delaware, Lack. & West. R. R.*, 229 U. S. 146	6
Santa Cruz Co. v. *National Labor Relations Board*, 303 U. S. 453	10
Southern Ry. Co. v. *Puckett*, 244 U. S. 571	6

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Cases—Continued. Page

Spinner v. *Waterways Fuel & Dock Co.*, 41 N. E. (2d) 144 .. 9
Steger v. *Beal & Stone Elec. Co.*, 4 Wage Hour Rept. 411 .. 9
Stoike v. *First National Bank of the City of New York*, 5 Wage Hour Rept. 560 9
Tate v. *Empire Bldg. Corp.*, 5 Wage Hour Rept. 475 9
Walling v. *Helena-Glendale Ferry Co.*, 5 Wage Hour Rept. 320 9
Williams v. *Jacksonville Terminal Co.*, 315 U. S. 386 8

Federal Statutes:

Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 (Fair Labor Standards Act):
Sec. 3 (j) 11
Sec. 6 11
Sec. 7 11
Sec. 16 (b) 11
Act of April 22, 1908, c. 149, 35 Stat. 65 (Federal Employers' Liability Act) 6
Act of August 11, 1939, c. 685, 53 Stat. 1404 (Federal Employers' Liability Act, amended) 7

Miscellaneous:

Annual Report of the Chief of Engineers, U. S. Army, Part 2, *Commercial Statistics—Water-borne Commerce of the United States* (1941) 4

In the Supreme Court of the United States

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H. T. OVERSTREET, R. BRAZIE, AND L. L. GARVIN, PETITIONERS

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MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the district court (R. 13–16) is reported in 43 F. Supp. 445. The opinion of the circuit court of appeals (R. 27–29) is reported in 128 F. (2d) 450.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 28, 1941 (R. 30). A petition for rehearing was filed on June 17, 1942 (R. 31–35), and was denied on June 30, 1942 (R. 36).

The petition for a writ of certiorari was filed on August 7, 1942, together with a motion for leave to proceed *in forma pauperis*. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Respondent owns and operates a toll road, including a drawbridge, lying entirely within the State of Florida. The road constitutes an integral part of an interstate highway system and is used by persons and vehicles traveling in interstate commerce. The drawbridge, which is part of the toll road, crosses a navigable stream used by vessels moving in interstate commerce. The question is whether employees of respondent who are engaged in maintaining and operating the toll road or the drawbridge are "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT

On September 26, 1941, petitioners and eleven other employees filed a complaint under Section 16 (b) of the Act against respondent and its subsidiary, Bay Shore Water and Light Company. The complaint alleged that petitioners were engaged in interstate commerce and were therefore

entitled to the benefits of the Act, but had not been paid the required minimum wages or overtime compensation. (R. 1–10.) Respondent's motion to dismiss as to all fourteen plaintiffs (R. 11–12) was granted by the district court (R. 13–15), with leave to the eleven plaintiffs alleged to be engaged in the maintenance of a telephone line operated by Bay Shore Water and Light Company to file an amended complaint. Since petitioners were not thus engaged, a motion to have the order of dismissal made final as to them (R. 18) was granted by the district court (R. 19).[1] The order dismissing the complaint was affirmed by the circuit court of appeals (R. 27–30).

The relevant facts alleged in the complaint, as amended (R. 1–10, 16), which must be taken as true for purposes of the motion to dismiss, may be summarized as follows:

Respondent owns and operates a toll road and a drawbridge which is a part of the road (R. 2). The toll road connects United States Highway No. 17, an arterial highway extending from Jacksonville, Florida, to New York City and points north, with Fort George Island, which lies off the northern coast of Florida (R. 2). The island is separated from the mainland by the Intracoastal Waterway, which extends from Miami to New York; the toll road crosses the Waterway at

[1] Of the original fourteen plaintiffs, only petitioners appealed to the circuit court of appeals and respondent North Shore Corporation was the sole appellee (see R. 20, 21, 24).

Sisters' Creek by means of respondent's drawbridge (R. 2, 3).

The toll road, which is alleged to constitute "an integral part of the highway system of the United States," provides the only means of land communication between Fort George Island and the mainland and is used extensively by persons and vehicles traveling between the island and points outside Florida in interstate commerce (R. 2). Mail to and from other States as well as goods produced outside Florida and consigned to merchants on the island are transported over the toll road (R. 3–4).

Sisters' Creek, a part of the Intracoastal Waterway,[2] is a navigable stream used by freight-carrying vessels plying in interstate commerce between Florida and northern States as well as by pleasure craft moving to and from Florida (R. 3). "Many" vessels operating in such commerce pass through respondent's drawbridge daily (R. 5).

[2] Sisters' Creek is part of that section of the Intracoastal Waterway which extends south from Fernandina Harbor, Florida, to the St. John's River, a distance of 25 miles. It is an important highway of commerce; in 1939 it carried 268,876 tons of freight and 15,900 passengers; in 1940, the amount of freight carried increased to 287,407 tons. Annual Report of the Chief of Engineers, U. S. Army, Part 2, *Commercial Statistics—Water-borne Commerce of the United States* (1941), p. 603. Three-fourths of the freight carried in 1940 (219,614 tons, or 76 per cent) was "through traffic," i. e., shipments in interstate commerce. *Id.*, p. 604. Commercial vessels made more than 5,000 trips over this portion of the Waterway during 1940. *Id.*, p. 605.

Each of the petitioners was employed by respondent in connection with the operation of the toll road and the drawbridge. Overstreet was the operator of the drawbridge, raising the bridge to permit the passage of boats through Sisters' Creek and lowering it for the resumption of traffic over the road (R. 5); Brazle was engaged in maintenance and repair work on the road and the bridge, his services being "necessary to the maintenance and use of the said toll road in interstate commerce" (R. 16); Garvin sold and collected toll tickets "from vehicles using said toll road in interstate commerce" and his duties "were necessary to the use and maintenance of the said road in interstate commerce" (*id.*). Petitioners received neither the minimum wages nor the overtime compensation prescribed by Sections 6 and 7 of the Act (R. 5–6, 8–10).

ARGUMENT

1. The case presents a question of considerable importance in the application and administration of the Fair Labor Standards Act. The decision creates uncertainty concerning the status of employees who are not engaged in production but whose work furthers and facilitates interstate commerce. The interpretation of the phrase "engaged in commerce" (Sections 6, 7, *infra*, p. 11) adopted by the court below represents an unduly narrow reading of this exercise of federal power,

and as applied to the Fair Labor Standards Act would exclude from the coverage of the Act many thousands of employees who are entitled to its benefits.

2. Upon the facts alleged in the complaint (*supra*, pp. 3–4), petitioners are engaged either in the maintenance or operation of instrumentalities of commerce or are engaged in both the maintenance and operation of such instrumentalities. The toll road and the drawbridge carry interstate vehicles and goods; operation of the drawbridge, in turn, is further a function of interstate commerce since it also opens the path, when raised, for interstate water commerce. Petitioners' maintenance and operation of the road and the bridge, accordingly, establish them as engaged "in" interstate commerce under principles long since established by this Court in cases arising out of the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, 35 Stat. 65). *Pedersen* v. *Delaware, Lack. & West. R. R.*, 229 U. S. 146, 151; *Louisville & Nashville R. R. Co.* v. *Parker*, 242 U. S. 13, 14–15; *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571, 573; *Philadelphia, B. & W. R. R. Co.* v. *Smith*, 250 U. S. 101, 103–104; *Philadelphia & Read. Ry. Co.* v. *DiDonato*, 256 U. S. 327, 329–331. An employment to perform "work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employ-

ment in such commerce . . . ." *Kinzell* v. *Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130, 133.[1] Plainly, neither the water-borne commerce on the Intracoastal Waterway nor the interstate transportation by automobile and truck along the toll road could proceed without performance of petitioners' duties. And neither the text nor the legislative history of the Fair Labor Standards Act affords any hint of congressional intention to depart from these established principles by contracting the clause "in commerce" so as to include only employees who transport goods across state lines or otherwise directly participate in state-to-state movement. Indeed, it would be illogical to conceive that employees who bear a "necessary" relation to production for commerce—a process once removed from actual interstate commerce—would be covered by the Act while those who bear an

[1] Subsequent to the decisions cited, The Federal Employers' Liability Act was amended to provide that "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Act of August 11, 1939, c. 685, 53 Stat. 1404. This incorporated into the statute, in effect, its prior judicial construction. Compare *New York Central R. R. Co.* v. *Carr*, 238 U. S. 260, 263–264. For the text of the Act prior to amendment see 223 U. S., pp. 6–9.

identical relation to the primary process of interstate commerce itself would not be covered.[1]

The conclusion that the clause "in commerce" as used in the Fair Labor Standards Act is not to be restricted in the manner indicated by the court below is affirmed by the decisions of this and other courts. In *Overnight Motor Transp. Co.* v. *Missel*, No. 939, last Term, decided June 8, 1942, a rate clerk employed by an interstate motor carrier was held to be engaged in commerce. Cf. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386. The same result has been reached as to maintenance employees, watchmen, and office and clerical workers by the lower federal and state courts. *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (N. D.

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[1] No basis for such a restrictive intent can be found to lie in the absence of a statutory definition of the phrase "engaged in commerce" in terms of "necessary" processes, although such a definition was included in respect of "production of goods for commerce", the alternative basis for coverage. Section 3 (j). *Kirschbaum* v. *Walling*, No. 910, last Term, decided June 1, 1942. At the time of the passage of the Act, principles relating to the permissible scope of regulation of productive processes were in flux (cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Hammer* v. *Dagenhart*, 247 U. S. 251) and elaboration of congressional definition in respect of the production aspect was, accordingly, appropriate. In contrast, the clause "in commerce" had acquired an established meaning and through repeated judicial construction had become recognized as including employee activities which facilitated interstate transportation and communication. Since the phrase had thus acquired these connotations, no occasion arose for elaboration.

Calif.); *Stoike* v. *First National Bank of the City of New York*, 5 Wage Hour Rept. 560 (N. Y. App. Div. 1942); *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.); *Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E. D. Pa.); *Mortenson* v. *Western Light & Telephone Co.*, 42 F. Supp. 319 (S. D. Iowa); *Steger* v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex. 1941); *Fleming* v. *Kull*, 4 Wage Hour Rept. 411 (E. D. Tex. 1941); *Spinner* v. *Waterways Fuel & Dock Co.*, 41 N. E. (2d) 144 (Ohio 1942); *Fleming* v. *Capital Broadcasting Co.*, 4 Wage Hour Rept. 124 (N. D. Ala. 1941); *Walling* v. *Helena-Glendale Ferry Co.*, 5 Wage Hour Rept. 320 (E. D. Ark. 1942). But cf. *Cochran* v. *Florida National Bldg. Corp.*, 5 Wage Hour Rept. 576 (S. D. Fla. 1942); *Johnson* v. *Downtown Development Co.*, 5 Wage Hour Rept. 462 (N. D. Tex. 1942); *Tate* v. *Empire Bldg. Corp.*, 5 Wage Hour Rept. 475 (E. D. Tenn. 1942).

The reasons given by the court below in support of its position are contrary to settled principles. In holding that *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, and *Detroit Bridge Co.* v. *Corporation Tax Board*, 294 U. S. 83, both of which were concerned only with the permissible area of state taxation, were "decisive" of the contention that petitioners were entitled to the benefits of the Fair Labor Standards Act (R. 28–29), the court assumed that the areas of valid state taxation and of federal regulation under the com-

merce clause are mutually exclusive. But see *Kirschbaum* v. *Walling*, No. 910, last Term, decided June 1, 1942; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 46; *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466. And in holding that if respondent is not engaged in interstate commerce its employees cannot be so engaged (R. 29), the court departed from the now settled principle that the duties of the employee and not the business of the employer is determinative of coverage under the Act.[*] *Kirschbaum* v. *Walling*, *supra*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

IRVING J. LEVY,
Acting Solicitor,
United States Department of Labor.

SEPTEMBER 1942.

[*] It is submitted that in any event the court's premise was in error. It seems plain that since respondent was in the business of maintaining and operating the road as a toll road, for which it collected fees, respondent was in fact engaged in interstate commerce.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*):

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—* * *

* * * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—* * *

* * * * * *

SEC. 16. * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employees or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

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No. 284

In the Supreme Court of the United States

OCTOBER TERM, 1942

H. T. OVERSTREET, R. BRAZLE, AND L. L. GARVIN,
PETITIONERS

v.

NORTH SHORE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Argument:	
Employees who maintain and repair the toll road, or who maintain, repair, or operate the drawbridge, or sell tickets and collect tolls for the use thereof are "engaged in commerce" within the meaning of Sections 6 and 7 of the Act	5
Conclusion	15
Appendix	16

CITATIONS

Cases:	
Adams Express Co. v. *Ohio*, 165 U. S. 194	8
Atlantic Co. v. *Walling*, 5 Wage Hour Rept. 916	13
Bacon v. *Illinois*, 277 U. S. 504	8
Baltimore & Ohio Railroad Co. v. *Interstate Commerce Commission*, 221 U. S. 612	7
Binderup v. *Pathe Exchange*, 263 U. S. 291	7
Bridge Co. v. *United States*, 105 U. S. 470	7
Chicago Board of Trade v. *Olsen*, 262 U. S. 1	8, 9, 14
Chicago and North Western Railway Co. v. *Bolle*, 284 U. S. 74	12
Cochran v. *Florida Natl. Bldg. Corp.*, 45 F. Supp. 880	13
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197	6
Covington &c. Bridge Co. v. *Kentucky*, 154 U. S. 204	8
Currin v. *Wallace*, 306 U. S. 1	6
Detroit Bridge Co. v. *Tax Board*, 294 U. S. 83	7
Economy Light & Power Co. v. *United States*, 256 U. S. 113	7
First Employers' Liability Cases, 207 U. S. 463	10
Fleming v. *American Stores Co.*, 42 F. Supp. 511	13
Fleming v. *Capital Broadcasting Co.*, 4 Wage Hour Rept. 124	13
Fleming v. *Kull*, 4 Wage Hour Rept. 411	13
Henderson Bridge Co. v. *Kentucky*, 166 U. S. 150	7
Johnson v. *Dallas Downtown Development Co.*, 5 Wage Hour Rept. 984	13

Cases—Continued.	Page
Johnson v. *Southern Pacific Co.*, 196 U. S. 1	7
Kansas Southern Ry. Co. v. *Kaw Valley District*, 233 U. S. 75	7
Kinsell v. *Chicago, Milwaukee & St. Paul Railway Co.*, 250 U. S. 130	10, 13
Kirschbaum Co. v. *Walling*, 316 U. S. 517	7, 8, 9
Lorenzetti v. *American Trust Co.*, 45 F. Supp. 128	13
Louisville & Nashville Railroad Co. v. *Parker*, 242 U. S. 13	10
McGoldrick v. *Berwind-White Co.*, 309 U. S. 33	7
Minnesota v. *Blasius*, 290 U. S. 1	7
Monongahela Bridge Co. v. *United States*, 216 U. S. 177	7
Monongahela Navigation Co. v. *United States*, 148 U. S. 312	7
Mortensen v. *Western Light & Telephone Co.*, 42 F. Supp. 319	13
Mulford v. *Smith*, 307 U. S. 38	6
New York Central Railroad Co. v. *Porter*, 249 U. S. 168	10
Oliver Iron Co. v. *Lord*, 262 U. S. 172	9
Overnight Co. v. *Missel*, 316 U. S. 572	13
Parker v. *Brown*, No. 46, this Term	9
Pedersen v. *Delaware, Lackawanna & Western Railroad*, 229 U. S. 146	10, 11
Pennsylvania v. *Wheeling Bridge Co.*, 18 How. 421	7
Philadelphia, B. & W. R. R. Co. v. *Smith*, 250 U. S. 101	10
Philadelphia & Reading Railway Co. v. *DiDonato*, 256 U. S. 327	10
Pittsburgh, etc., Ry. v. *Board of Public Works of West Virginia*, 172 U. S. 32	8, 9
Roder v. *Baltimore & Ohio Railroad Co.*, 108 F. (2d) 980, certiorari denied, 309 U. S. 682	10
St. Louis & East St. L. Ry. Co. v. *Hagerman*, 256 U. S. 314	8
Santa Cruz Co. v. *National Labor Relations Board*, 303 U. S. 453	7
Second Employers' Liability Cases, 223 U. S. 1	7, 10
Southern Pacific Co. v. *Industrial Accident Commission*, 251 U. S. 259	10
Southern Railway Co. v. *Puckett*, 244 U. S. 571	10
Southern Railway Co. v. *United States*, 222 U. S. 20	7
Southern Ry. Co. v. *Watts*, 260 U. S. 519	8
Spinner v. *Waterways Fuel & Dock Co.*, 41 N. E. (2d) 144	13
Stafford v. *Wallace*, 258 U. S. 495	7, 9, 14
Steger v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411	13
Stoike v. *First National Bank of the City of New York*, 5 Wage Hour Rept. 560	13
Swift & Co. v. *United States*, 196 U. S. 375	8

Cases—Continued.

	Page
Tate v. *Empire Bldg. Corp.*, 5 Wage Hour Rept. 475	14
Townsend v. *Yeomans*, 301 U. S. 441	8
United States v. *Darby*, 312 U. S. 100	6
United States v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1	6
United States v. *Rock Royal Co-operative*, 307 U. S. 533	6
United States v. *Wrightwood Dairy Company*, 315 U. S. 110	6
Walling v. *Helena-Glendale Ferry Co.*, 5 Wage Hour Rept. 320	13
Walling v. *Jacksonville Paper Company*, No. 336, this Term	14
Warren-Bradshaw Drilling Co. v. *Hall*, No. 21, this Term, decided November 9, 1942	9
Wells, Fargo & Co. v. *Nevada*, 248 U. S. 165	8
Wickard v. *Filburn*, No. 59, this Term, decided November 9, 1942	6
Williams v. *Jacksonville Terminal Co.*, 315 U. S. 386	13
Wilson v. *New*, 243 U. S. 332	7
Statutes:	
Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*):	
Sec. 2 (a)	15
Sec. 3. (b)	15
Sec. 6. (a)	15
Sec. 7. (a)	16
Federal Employers Liability Act (Act of April 22, 1908, c. 149, 35 Stat. 65)	10
Miscellaneous:	
Annual Report of the Chief of Engineers, U. S. Army, Part 2, *Commercial Statistics—Water-borne Commerce of the United States* (1941)	4
83 Cong. Rec. 7434	12
Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st sess. (1937)	12

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BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Solicitor General submits this brief on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae*.

OPINIONS BELOW

The opinion of the district court (R. 8–10) is reported in 43 F. Supp. 445. The opinion of the circuit court of appeals (R. 11–13) is reported in 128 F. (2d) 430.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 28, 1941. A petition for rehearing was denied, without opinion, on June 30, 1942 (R. 13). A petition for a writ of certiorari, together with a motion for leave to proceed *in forma pauperis*, were filed on August 7, 1942, and were granted October 12, 1942 (R. 13). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether persons engaged in maintaining or operating a toll road and a drawbridge over a navigable waterway which together constitute a medium for the interstate movement of goods and persons are "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT

On September 26, 1941, petitioners and eleven other employees filed a complaint under Section 16 (b) of the Act against respondent and its subsidiary, Bay Shore Water & Light Company. The complaint alleged that petitioners were engaged in interstate commerce and were therefore

entitled to the benefits of the Act, but had not been paid the required minimum wages or overtime compensation (R. 1–8). Respondent's motion to dismiss as to all fourteen plaintiffs was granted by the district court (R. 8–10), with leave to the eleven plaintiffs alleged to be engaged in the maintenance of a telephone line operated by Bay Shore Water and Light Company to file an amended complaint. Since petitioners were not thus engaged, a motion to have the order of dismissal made final as to them was granted by the district court (R. 11).[1] The order dismissing the complaint was affirmed by the circuit court of appeals (R. 11–13).

The relevant facts alleged in the complaint, as amended (R. 1–8, 10), which must be taken as true for purposes of the motion to dismiss, may be summarized as follows:

Respondent owns and operates a toll road and a drawbridge which is a part of the road (R. 1–2). The toll road connects United States Highway No. 17, an arterial highway extending from Jacksonville, Florida, to New York City and points north, with Fort George Island, which lies off the northern coast of Florida. (R. 1–2.) The island is separated from the mainland by the Intercoastal Waterway, which extends from Miami to New York; the toll road crosses the Waterway at

[1] Of the original fourteen plaintiffs, only petitioners appealed to the circuit court of appeals, and respondent North Shore Corporation was the sole appellee.

Sisters Creek by means of respondent's drawbridge (R. 2).

The toll road, which is alleged to constitute "an integral part of the highway system of the United States," provides the only means of land communication between Fort George Island and the mainland and is used extensively by persons and vehicles traveling between the island and points outside Florida in interstate commerce (R. 2). Mail to and from other States as well as goods produced outside Florida and consigned to merchants on the island are transported over the toll road (R. 2–3).

Sisters Creek, a part of the Intercoastal Waterway, is a navigable stream used by freight-carrying vessels plying in interstate commerce between Florida and northern States as well as by pleasure craft moving to and from Florida (R. 2). "Many" vessels operating in such commerce pass through respondent's drawbridge daily (R. 4).[2]

[2] Sisters Creek is part of that section of the Intracoastal Waterway which extends south from Fernandina Harbor, Florida, to the St. Johns River, a distance of 25 miles. It is an important highway of commerce; in 1939 it carried 268,876 tons of freight and 15,900 passengers; in 1940 the amount of freight carried increased to 287,407 tons. Annual Report of the Chief of Engineers, U. S. Army, Part 2, *Commercial Statistics—Water-borne Commerce of the United States* (1941), p. 603. Three-fourths of the freight carried in 1940 (219,614 tons, or 76 percent) was "through traffic," i. e., shipments in interstate commerce. *Id.*, p. 604. Commercial vessels made more than 5,000 trips over this portion of the Waterway during 1940. *Id.*, p. 605.

Each of the petitioners was employed by respondent in connection with the operation of the toll road and the drawbridge. Overstreet was the operator of the drawbridge, raising the bridge to permit the passage of boats through Sisters Creek and lowering it for the resumption of traffic over the road (R. 4); Brazle was engaged in maintenance and repair work on the road and the bridge, his services being "necessary to the maintenance and use of the said toll road in interstate commerce" (R. 10); Garvin sold and collected toll tickets "from vehicles using said toll road in interstate commerce" and his duties "were necessary to the use and maintenance of the said road in interstate commerce" (*id.*). Petitioners received neither the minimum wages nor the overtime compensation prescribed by Sections 6 and 7 of the Act (R. 4–5, 6–8).

ARGUMENT

EMPLOYEES WHO MAINTAIN AND REPAIR THE TOLL ROAD, OR WHO MAINTAIN, REPAIR, OR OPERATE THE DRAWBRIDGE, OR SELL TICKETS AND COLLECT TOLLS FOR THE USE THEREOF ARE "ENGAGED IN COMMERCE" WITHIN THE MEANING OF SECTIONS 6 AND 7 OF THE ACT

Upon the facts alleged in the complaint, petitioners are engaged either in the maintenance or operation of instrumentalities of interstate commerce, or they are engaged in both the maintenance and operation of such instrumentalities. The toll

road and the drawbridge are continuously used in the interstate movement of persons and goods;[3] operation of the drawbridge is, further, a function of interstate commerce since it also opens the path, when raised, for interstate commerce by water. Since plainly, neither the water-borne commerce on the Intercoastal Waterway nor the interstate transportation by automobile and truck along the toll road could proceed without the performance of petitioners' duties, there is little question that respondent's business is within the ambit of national authority under the commerce clause. *United States* v. *Darby*, 312 U. S. 100; *Wickard* v. *Filburn*, No. 59, this Term, decided November 9, 1942; *United States* v. *Wrightwood Dairy Company*, 315 U. S. 110; *United States* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.[4] And the regulation of the wages and working conditions of persons operating or maintaining these instrumentalities of interstate commerce is likewise clearly within the ambit of federal authority. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *United States* v. *Darby*, *supra*, p. 6; *Wil-*

[3] The intrastate movement of goods and persons over the toll road and bridge does not alter the character of these facilities as instrumentalities of interstate commerce, subject to national regulation as such. *Cf. Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38; *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 568–569.

[4] Indeed, the drawbridge (spanning as it does a navigable stream, which is a popular channel for interstate commerce)

son v. *New*, 243 U. S. 332; *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 619; *Second Employers' Liability Cases*, 223 U. S. 1; cf. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1. Accordingly the States' power to tax the property of a corporation owning these instrumentalities (*e. g.*, *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *Detroit Bridge Co.* v. *Tax Board*, 294 U. S. 83) does not imply any lack of authority in the Federal Government to regulate the activities here in question.

In fact, in the state tax cases "the question is not with respect to the extent of the power of Congress to protect interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with that paramount authority." *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466. See also, *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 521; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 46–48; *Minnesota* v. *Blasius*, 290 U. S. 1, 8; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 311; *Stafford* v. *Wallace*, 258 U. S. 495,

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and its operation are peculiarly subjects for federal regulation. *Cf., e. g., Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421; *Bridge Co.* v. *United States*, 105 U. S. 470; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *Kansas Southern Ry. Co.* v. *Kaw Valley District*, 233 U. S. 75; *Economy Light & Power Co.* v. *United States*, 256 U. S. 113; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177.

525–526; *Swift & Co.* v. *United States*, 196 U. S. 375, 400. While therefore those cases determine the circumstances under which the states may appropriately tax instrumentalities of interstate commerce (*Adams Express Co.* v. *Ohio*, 165 U. S. 194; *Wells, Fargo & Co.* v. *Nevada*, 248 U. S. 165; *St. Louis & East St. L. Ry. Co.* v. *Hagerman*, 256 U. S. 314; *Southern Ry. Co.* v. *Watts*, 260 U. S. 519; *Pittsburgh, etc., Ry.* v. *Board of Public Works of West Virginia*, 172 U. S. 32; *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 212) their conclusions as to the propriety of state taxation do not mark out the boundaries of federal power under the commerce clause.[5]

Nor do they cast any light on the meaning of congressional legislation in general or the Fair Labor Standards Act in particular. Determinations with respect to the propriety of state taxa-

[5] Compare, for instance, *Minnesota* v. *Blasius*, 290 U. S. 1 (cattle moving through stockyards on way to eastern markets, held subject to state property tax) with *Stafford* v. *Wallace*, 258 U. S. 495 (such cattle held subject to federal control under Packers and Stock Yards Act); *Bacon* v. *Illinois*, 227 U. S. 504 (grain temporarily in Illinois taxable by state) with *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 (upholding federal regulation of trading in the same grain); *Townsend* v. *Yeomans*, 301 U. S. 441 (state regulation of tobacco warehousemen upheld) with *Mulford* v. *Smith*, 307 U. S. 38 (same warehousemen held subject to federal control).

See *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 521, where Mr. Justice Frankfurter stated:

"* * * enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting

tion of instrumentalities of interstate commerce do not strip those instrumentalities of their characteristics as such. Compare *Pittsburgh, etc., Ry.* v. *Board of Public Works of West Virginia*, 172 U. S. 32, 43. And since those decisions did not seek to appraise or qualify the scope of national legislation in any way, or even to measure state power by implication from the language of federal statutes, they are of little assistance in ascertaining the coverage of a federal statute which embodies independent congressional policies and objectives. Thus, even if the state tax cases are relevant in determining whether respondent's business is in interstate commerce for some purposes, the coverage of this Act, addressed as it is to the activities of the employees (cf. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524–525; *Warren-Bradshaw Drilling Co.* v. *Hall*, No. 21, this Term, decided November 9, 1942), must be measured by different standards.[6]

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an unconstitutional burden on interstate commerce. Compare *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, and *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, with *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381."

For a fuller discussion of this question see the brief of the United States as *amicus curiae* in *Parker* v. *Brown*, No. 46, this Term, Point III.

[6] In that connection it should be noted that respondent's business is not less closely related to the "stream of commerce" than were, for example, the activities on the grain exchange in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, or the operations at the stockyards in *Stafford* v. *Wallace*, 258 U. S. 495; see *supra*, note 2.

More relevant data on the question whether petitioners are "engaged in commerce" within the Fair Labor Standards Act is furnished by the construction long given to comparable language of coverage in the Federal Employers Liability Act (Act of April 22, 1908, c. 149, 35 Stat. 65). Under the provisions of that Act, which like the Act here involved were aimed at the activities of employees and their relationship to interstate commerce (compare *First Employers' Liability Cases*, 207 U. S. 463, with *Second Employers' Liability Cases*, 223 U. S. 1, and cf. *Kirschbaum Co.* v. *Walling, supra; Warren-Bradshaw Drilling Co.* v. *Hall, supra*) it is now well established that petitioners' activities would constitute employment in interstate commerce. *Pederson* v. *Delaware, Lackawanna & Western Railroad*, 229 U. S. 146; *Kinzell* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 250 U. S. 130, 133; *Southern Railway Co.* v. *Puckett*, 244 U. S. 571, 573; *Philadelphia, B. & W. R. R. Co.* v. *Smith*, 250 U. S. 101, 103–104. Compare *Southern Pacific Co.* v. *Industrial Accident Commission*, 251 U. S. 259; *New York Central Railroad Co.* v. *Porter*, 249 U. S. 168; *Philadelphia & Reading Railway Co.* v. *DiDonato*, 256 U. S. 327, 329–331; *Rader* v. *Baltimore & Ohio Railroad Co.*, 108 F. (2d) 980 (C. C. A. 7), certiorari denied, 309 U. S. 682. Cf. also *Louisville & Nashville Railroad Co.* v. *Parker*, 242 U. S. 13, 14–15. Of particular sig-

nificance for the present case is the decision in *Pederson* v. *Delaware, Lackawanna & Western Railroad Co., supra,* where, in holding that a person engaged in the work of maintaining tracks and bridges in proper condition during their use as instrumentalities of interstate commerce is employed in interstate commerce, Mr. Justice Van Devanter said:

> Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. * * * we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used *is so closely related to such commerce as to be in practice and in legal contemplation a part of it.* * * * [Italics supplied.] (p. 151.)

Neither the text nor the legislative history of the Fair Labor Standards Act affords any hint of Congressional intention to depart from these principles by contracting the phrase "in commerce" to include only employees who transport goods across state lines or otherwise participate directly in state-to-state movement.[1] Nor is there any evidence to indicate that Congress intended that employees who bear a "necessary" relation to production for commerce—a process once removed from actual commerce—would be covered by the Act while those who bear a considerably closer relation to the primary process of interstate commerce itself would not be covered. At the very least (particularly since "commerce" is a broader conception than "transportation," *cf. Chicago and North Western Railway Co.* v. *Bolle*, 284 U. S. 74) the coverage of the phrase "engaged in commerce" in the Fair Labor Standards Act would include activities which were sufficient to bring employees within the Federal Employers Liability Act. Certainly under the Act here involved, therefore, "work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such

[1] Indeed, the legislative history of the Act discloses that earlier constructions of that phrase by this Court were brought to the attention of Congress. See 83 Cong. Rec. 7434. Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. (1937), p. 43.

commerce" (*Kinzell* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 250 U. S. 130, 133).

The conclusion that the clause "in commerce" as used in the Fair Labor Standards Act is not to be restricted in the manner indicated by the court below is confirmed by the decisions of this and other courts. In *Overnight Co.* v. *Missel*, 316 U. S. 572, a rate clerk employed by an interstate motor carrier was held to be engaged in commerce. Cf. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386. The same result has been reached as to maintenance employees, watchmen, and office and clerical workers by the lower Federal and State courts. *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (N. D. Calif.); *Stoike* v. *First National Bank of the City of New York*, 5 Wage Hour Rept. 560 (N. Y. App. Div., 1942); *Atlantic Co.* v. *Walling*, 5 Wage Hour Rept. 916 (C. C. A. 5, 1942); *Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E. D. Pa.); *Mortenson* v. *Western Light & Telephone Co.*, 42 F. Supp. 319 (S. D. Iowa); *Steger* v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex., 1941); *Fleming* v. *Kull*, 4 Wage Hour Rept. 411 (E. D. Tex., 1941); *Spinner* v. *Waterways Fuel & Dock Co.*, 41 N. E. (2d) 144 (Ohio Ct. App., 1942); *Fleming* v. *Capital Broadcasting Co.*, 4 Wage Hour Rept. 124 (M. D. Ala., 1941); *Walling* v. *Helena-Glendale Ferry Co.*, 5 Wage Hour Rept. 320 (E. D. Ark., 1942). But *cf. Cochran* v. *Florida Natl. Bldg. Corp.*, 45 F. Supp. 830; *Johnson* v. *Dallas Downtown Development*

Co., 3 Wage Hour Rept. 984 (decided December 10, 1942, C. C. A. 5); *Tate* v. *Empire Bldg. Corp.*, 3 Wage Hour Rept. 475 (E. D. Tenn., 1942), pending on appeal in C. C. A. 6.

There is no occasion here to investigate the scope of the phrase "engaged in commerce" with respect to the activities of employees of persons whose business operations constitute part of the "stream of commerce." *Cf. Chicago Board of Trade* v. *Olsen, supra; Stafford* v. *Wallace, supra;* and compare brief for petitioner in *Walling* v. *Jacksonville Paper Company*, No. 336, this Term. The question presented by this case is considerably narrower. We submit that petitioners, in maintaining and operating the toll road and drawbridge which were in constant use in the interstate transportation of goods and persons are "engaged in commerce" within the meaning of that term in the Fair Labor Standards Act.

CONCLUSION

It is respectfully submitted that the judgment of the circuit court of appeals should be reversed.

CHARLES FAHY,
Solicitor General.

IRVING J. LEVY,
Acting Solicitor,

PETER SEITZ,
Attorney,
Department of Labor.

DECEMBER 1942.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*):

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

* * * * *

SEC. 3. (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

U. S. GOVERNMENT PRINTING OFFICE: 1938

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JAN 11 1943

No. 284

In the Supreme Court of the United States

OCTOBER TERM, 1942

H. T. OVERSTREET, R. BRAZLE, AND L. L. GARVIN, PETITIONERS

v.

NORTH SHORE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM ON THE LEGISLATIVE HISTORY AND ADMINISTRATIVE INTERPRETATIONS OF THE COVERAGE OF THE FAIR LABOR STANDARDS ACT, ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

SUPPLEMENTAL MEMORANDUM OF THE LEGISLATIVE HISTORY AND ADMINISTRATIVE INTERPRETATIONS OF THE COVERAGE OF THE FAIR LABOR STANDARDS ACT

The Congressional debates on the final version of the bill demonstrate that the statute was intended to have sweeping reach. The proponents of the legislation in its development through the committees and its management on the floor debated the constitutional issues raised in respect of the legislation from the assumption that a full exercise of the commerce power was involved.[1] However, we have no need to press this point,

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[1] See generally 83 Cong. Rec. 9166–9173. Senator Wagner went so far as to state (83 Cong. Rec. at 9173):

"My prediction is that the same workers whom the courts have held to be in or directly affecting interstate commerce under the National Labor Relations Act will be regarded as subject to the Federal commerce power under the provisions of the bill which we are now considering. Apart from all other theories of jurisdiction, this bill also exercises the constitutional power of Congress to bar unfair goods from the channels of interstate commerce, even where Congress may not regulate directly the employment relations involved."

In response to a question by Senator Bailey, asking whether a cotton mill worker was "in commerce" because his employer shipped goods interstate, Senator Borah, one of the Senate managers who participated in the conference which wrote the bill as enacted, replied:

"If he is working in the production of goods which are being prepared for interstate commerce, and it is part of

and indeed we recognize the conflict between this assumption in the debates and the language changes in the bill itself as items of legislative history. But one thing is clear and that is the one thing of our concern. In considering the scope of the phrase "engaged in commerce," the frame of reference which the committees and the Congress had in mind was at least as broad as that defined by interpretations of that phrase in the decisions of this Court under the Employers' Liability Acts.[8] There is no suggestion that the state tax cases were considered or brought to the attention of the Congress in any discussion of the scope of the phrase "engaged in commerce."

Moreover, from the first committee hearings on the bill to the final debates, even those who took the more restricted view of the federal commerce power—that employees engaged in the manufacture of goods for interstate shipment were beyond the reach of that power—agreed that it embraced those engaged in servicing the instrumentalities

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the system to ship the goods in interstate commerce, the whole transaction is interstate commerce, as was held by the court in the *Jones & Laughlin case*" (83 Cong. Rec. 9167).

Other direct references to the Wagner Act appear at 83 Cong. Rec. 9170 (Senator Lewis); 9172 (Senator Minton).

[8] See 83 Cong. Rec. 7434, 9170–9172; Joint Hearings before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives, on S. 2475 and H. R. 7200, 75th Cong., 1st Sess., pp. 43, 59.

of commerce.' And the debates contain pointed evidence that Congress intended in this statute to cover occupations of the kind involved in the instant case. Thus, in urging the bill's passage during the final arguments in the House, one of the members who served on the joint committee which considered the bill, after first carefully pointing out that its final version applied "to interstate business exclusively," specifically cited railroad track maintenance laborers, such as "section and extra gangmen," a class of workers

[1] During the legislative hearings the general counsel for the National Association of Manufacturers, appearing in opposition to the bill, made the following statement (Joint Hearings before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives, 75th Cong., 1st Sess., on S. 2475 and H. R. 7200, p. 643):

"I do not believe that Congress, under the commerce power, possesses the power to fix wages and hours, except in the employments which are clearly subject to its authority. I do recognize that there are many employments that are subject to the exercise of the commerce power, as, for instance, those embraced within the Railroad Labor Act, and all instrumentalities of interstate commerce are subject to it. Of course, all public employees are within the jurisdiction of Congress."

The following illuminating colloquy took place between Senator Borah, one of the bill's leading proponents, and Senator Bailey, leader of the unsuccessful constitutional attack against the bill in the Senate, who contended that manufacture was not subject to the commerce power:

"Mr. Borah. But the Senator would not contend that a person working, for instance, in a machine shop of a railroad company, who himself individually was never in the channels of trade, who lived and did his work solely within

strikingly analogous to petitioners, as among those who would benefit. 83 Cong. Rec. 9260, 9262.

Not only does the legislative history of the Act thus support the coverage here urged for the phrase "engaged in commerce," but the established interpretation of that phrase by the Wage and Hour Division includes petitioners in its coverage.[4] This "contemporaneous construction

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the State as a workman in a machine shop, could not be included as a part of the railroad system in regulating the wages and conditions of labor?

"Mr. BAILEY. I may surprise the Senator, but I think I would contend that the entire railroad organization is an instrumentality of commerce between the States and relates to every man wherever he may be and whatever he is doing, providing he is doing something with regard to that system. The instrumentality idea as applied to railroads takes in the whole system, not merely the man who runs the engine or the conductor who manages the car or the brakeman, but the machinist in the shop who never leaves the borders of the State. I think that is the established doctrine.

"Mr. BORAH. But then if we should establish, with reference to any other industry, the fact that the labor was a part of the industrial system, and the industrial system occupied the channels of interstate trade, the doctrine with reference to the man working in the machine shop would apply in that instance; would it not?

"Mr. BAILEY. He is in the whole railroad system that is in itself, as a whole, the instrument of commerce between the States; but the man in the cotton mill is not in any such system" (83 Cong. Rec. 9168–69).

[4] In its Interpretative Bulletin No. 5, issued in November 1939, the Wage and Hour Division stated (at p. 7): "Employees of contractors engaged in maintaining, repairing or reconstructing railroads * * * highways, bridges * * * or other essential instrumentalities of interstate * * *

of * * * [the] * * * statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" (*Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; quoted in *United States* v. *American Trucking Associations*, 310 U. S. 534, 549) is entitled to judicial affirmation.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

JANUARY 1943.

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commerce would seem to be engaged in interstate commerce and subject to the act * * *." In a release of May 15, 1941, also prior to the date on which the present case was begun, the Wage and Hour Division, elaborating on its Bulletin No. 5, held that the Act generally covered "the maintenance, repair and reconstruction of * * * railroad tracks, equipment and facilities; highways; * * * (and) bridges over which interstate commerce more or less regularly travels * * *."

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Supreme Court, U. S.
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JAN 6 1943
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 284.

H. T. OVERSTREET ET AL., *Petitioners,*

v.

THE NORTH SHORE CORPORATION, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF THE AMERICAN TOLL BRIDGE ASSOCIATION AND THE JAMES RIVER BRIDGE SYSTEM, AS AMICI CURIAE.

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General Counsel, American Toll Bridge Association, and Counsel for James River Bridge System.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Opinions Below 1

Jurisdiction 1

Question Presented 2

Preliminary Statement 2

Argument 3

Summary of Argument 3

(A) The Legal Status of Toll Bridges, and employees operating such Facilities, has been definitely established as not a part of interstate commerce.. 3

(B) The arguments on behalf of petitioners and the Administrator are contrary to and unsupported by the manifest intent of the statute involved .. 3

Conclusion 8

CITATIONS.

CASES:

Detroit International Bridge Co. v. Tax Appeal Board, 294 U. S. 83 3

Federal Trade Commission v. Bunte Bros. Co., 312 U. S. 349 ..... 5, 6, 7

Gouax v. Bovay, 105 Fed. (2d) 256 4

Henderson Bridge Co. v. Kentucky, 166 U. S. 150 ... 3

Johnson v. Dallas Downtown Development Co., 5 Wage Hour Dept. 984 8

Kirschbaum v. Walling, 316 U. S. 517 ..... 4, 5, 7, 8, 9

United States v. Darby, 312 U. S. 100 5

Warren-Bradshaw Drilling Co. v. Hall, No. 21, this Term, dec. Nov. 9, 1942 5

STATUTES:

Act of March 3, 1899 (30 Stat. 1151) 4

Act of March 23, 1906 (34 Stat. 84) 4

Fair Labor Standards Act of 1938 (52 Stat. 1060) 2, 3

Section 3(b) 4, 5

Section 3(d) 9

Section 3(j) 5

Federal Employers' Liability Act, 35 Stat. 65, amended, 53 Stat. 1404 ..... 5, 7, 8

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF HARRY J. GERRITY, ON BEHALF OF THE AMERICAN TOLL BRIDGE ASSOCIATION AND THE JAMES RIVER BRIDGE SYSTEM, AS AMICI CURIAE.

OPINIONS BELOW.

The opinion of the District Court (R. 8-10) is reported in 43 F. Supp. 445. The opinion of the Circuit Court of Appeals (R. 11-13) is reported in 128 F. (2d) 450.

JURISDICTION.

A petition for a writ of certiorari was granted October 12, 1942 (R. 13). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

QUESTION PRESENTED.

Whether persons engaged in maintaining or operating a toll road or a drawbridge over a navigable waterway are "engaged in commerce" within the meaning of the Fair Labor Standards Act (52 Stat. 1060).

PRELIMINARY STATEMENT.

1. According to the Public Roads Administration, there were 235 toll bridges and 7 toll tunnels in operation at the close of 1941. The bridges include 115 publicly-owned and 120 privately-owned. Five of the tunnels are publicly-owned and 2 privately-owned. There are 22 international toll bridges, and 97 interstate, and 116 intrastate. Four tunnels are intrastate; 2 are interstate, and one is an international tunnel between the United States and Canada. Approximately 38 of the publicly-owned toll bridges are operated by State highway departments, and the remaining ones by commissions and State bridge authorities, some of which may be classified as political subdivisions of a State. There are 24 toll roads throughout the country, all intrastate, covering a total distance of 335.19 miles.[1]

2. The James River Bridge System owns and operates three toll bridges crossing the James River, Chuckatuck Creek, and the Nansemond River, all navigable waterways lying wholly within the State of Virginia, erected pursuant to an act of the Virginia Legislature, approved April 8, 1927. The three bridges are operated as a unit and connect at the north and south termini with U. S. Highway Route No. 17, extending from Punta Gorda, Florida, to Fredericksburg, Va. The bridge across the James River, which is the longest, is partly a through truss and elevator lift span type of structure. The bridge system comprises approximately six miles of bridges and eleven miles of roads. The roads are used by the general public. It is estimated

[1] Report "Toll Roads in the United States" as of December 31, 1940, Federal Works Agency, Public Roads Administration.

that as much as 75 per cent of the traffic over the roads does not cross any of the bridges, and hence pays no toll charge. The James River Bridge System is a private corporation.

3. The legal issues involved in the case now before the Court vitally affect all toll bridges in the United States. Under prior decisions of the Court it has been regarded as settled law that a toll bridge is not engaged in interstate commerce. The Fair Labor Standards Act (52 Stat. 1060) should not be construed so as to cover employees of toll bridges or tunnels. These employees are not engaged in interstate commerce. Congress did not intend to include employees whose work or services are not directly a part of interstate commerce. The employees involved in the instant case perform work similar to that of employees of toll bridges and tunnels. Counsel earnestly believes it was not the intention of Congress to include these employees within the coverage of the Act. The decision below should be affirmed.

ARGUMENT.

Summary of Argument.

(A) The legal status of toll bridges, and employees operating such facilities, has been definitely established as not a part of interstate commerce.

(B) The arguments on behalf of petitioners and the Administrator are contrary to and unsupported by the manifest intent of the statute involved.

Point A.

Toll bridges generally have relied for many years on the decisions of this Court (*Henderson Bridge Co.* v. *Kentucky*, (1897), 166 U. S. 150; *Detroit International Bridge Co.* v. *Tax Appeal Board*, (1935), 294 U. S. 83), holding that the ownership and operation of a toll bridge does not constitute interstate commerce, within the scope and meaning of the Commerce Clause of the Constitution.

The legal status of toll bridges has thus been regarded as definitely settled. These decisions should not be disturbed or their authority weakened by expanding the meaning of the phrase "interstate commerce" in applying the Fair Labor Standards Act of 1938 to the facts presented in the case at bar.

Section 3(b) of the Act defines "commerce" to mean, in part, "transportation, transmission, or communication among the several States or from any State to any place outside thereof." The toll bridge, or toll road, as in the instant case, does not transport or transmit persons or vehicles, "but merely permits the transit of them." (*Gouax* v. *Bovay*, 105 Fed. (2d) 256, 258; certiorari denied, 308 U. S. 607.)

Even admitting that the Act expressly makes its application dependent upon the character of the employees' activities, or, that to the extent that an employee is "engaged in the production of goods for commerce" the employer is himself so engaged (*Kirschbaum* v. *Walling*, 316 U. S. 517), it is equally apparent that the employees in the present case are in no proper sense engaged in transportation, transmission, or communication, within the purview of Section 3(b) of the Act. By ignoring the toll road corporation, as the employer, and regarding these employees as "engaged in commerce", within the meaning of the Act, the Court as a logical consequence will be forced to condemn the solid reasoning of its prior decisions holding that the ownership and operation of toll facilities do not constitute engaging in interstate commerce.

Congress has plenary power over the navigable waters of the United States. It has exercised regulatory power in respect of the construction and operation of toll bridges by the Act of March 3, 1899 (30 Stat. 1151), and the Act of March 23, 1906 (34 Stat. 84). But Congress has recognized, in the statutes cited, a different mode of authorization in the case of bridges spanning navigable waters lying wholly within the limits of a single State. None of the bridges of

the James River Bridge System, nor the drawbridge over Sisters' Creek, in the instant case, were erected over interstate navigable streams.

The employee's operation of the mechanical lift span over the James River is not engaging in commerce. The James River is a public highway to the same extent as U. S. Route 17, which connects with the bridge system. Moreover, when the operator of the lift span removes the artificial obstruction to navigation on the river, he does not engage in the commerce, transportation, transmission, or communication which is carried on over the waterway by persons using the river.

The case before the Court does not concern the power of Congress. It presents simply a question of legislative intent. The purpose and intention of Congress is abundantly manifest. (*United States* v. *Darby*, 312 U. S. 100.) In the *Kirschbaum* case, *supra*, Mr. Justice Frankfurter stated:

> "Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local. One need refer only to the history of Congressional control over the rates of intrastate carriers which affect commerce, and the amendment of August 11, 1939, to the Federal Employers' Liability Act, extending the scope of that Act to employees who 'shall, in any way directly or closely and substantially, affect' interstate commerce, 53 Stat. 1404. Compare *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349."

Unlike in the *Kirschbaum* case, *supra*, the production of goods for commerce is not involved in the case at bar; and, hence, Section 3(j) of the Act has no application. This is further illustrated by the facts and the ruling in *Warren-Bradshaw Drilling Co.* v. *Hall*, No. 21, this Term, decided November 9, 1942. The precise question is posed, as in *Federal Trade Commission* v. *Bunte Bros.*, *supra*, whether within the statutory definition of interstate commerce (Section 3(b)) the activities of the employees of the toll road

corporation make them "engaged in commerce" within the purview of the Act.

As in the *Bunte Bros.* case, *supra*, the instant case "presents the narrow question of what Congress did, not what it could do." The two factual situations are strikingly parallel in the light of the legislative background of each. The affirmance of the decision below will not thwart the will or intention of Congress any more than the conclusion reached by this Court in the case cited.

Point B.

The arguments in the brief submitted on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae* (pages 6-8), regarding the power of Congress under the commerce clause, are beside the point. No one can seriously question the power of Congress to regulate the respondent's business or that of all toll bridges in so far as they affect transportation in interstate commerce. Instrumentalities of interstate commerce may be entirely non-regulated, or only partly regulated. The degree or extent of regulation is a matter for Congress to decide.

As already pointed out, the toll road or toll bridge does not transport, transmit, or "carry" either persons, vehicles or goods. Such bridge or road, as part of the public highways, may be an instrumentality of interstate commerce—a facility for the promotion of such commerce,—but so are the free public highways throughout the Nation. The distinction is clearly illustrated in the case of a railroad, which is also a public highway. The railroad company, however, engages in transportation over the highway and is a common carrier for hire. The toll road or toll bridge is not a common carrier; such facilities do not "carry" or transport anything.

The performance of petitioners' duties are no part of the commerce which takes place over the toll road or the Intracoastal Waterway. The drawbridge operator merely re-

adjusts the highway facility for the movement of commerce over the toll road and waterway, or vice versa. He removes the obstruction to the navigation or transportation on the river. The repair man does not engage in interstate commerce by merely repairing the toll road or the drawbridge. The toll collector simply takes payment of the fee or toll charged for the passage of persons or vehicles over the toll road; in fact, a charge or rental for the temporary use and occupancy of the premises. These employees may be "necessary" for the operation of their employer's business, but they clearly are "not in any fitting sense necessary" to the transportation or commerce carried on by those who make use of the highways.

We submit, that if the toll collector of the North Shore Corporation is engaged in interstate commerce when he collects a toll from those who enter upon the highway owned by the respondent, then the employee of the gasoline station who sells fuel to vehicles on any public highway, the local garage mechanic who repairs a motor vehicle, or the men who repair and clean the public streets of any municipality, are also engaged in interstate commerce. Such a conclusion is both unsound and absurd. It is immaterial whether the work of respondent's employees further and facilitate interstate commerce. The prior decisions under the Federal Employers' Liability Act (35 Stat. 65, as amended 53 Stat. 1404), are without application, because in every case the employer's business was a part of interstate commerce. Congress must be presumed to know that this Court has definitely held that, under the commerce clause, a toll bridge is not a part of interstate transportation.

The Government's brief contains no reference to the case of *Federal Trade Commission* v. *Bunte Bros.*, *supra*, which was cited by Mr. Justice Frankfurter in the *Kirschbaum* case (see page 5 herein) by way of comparison. This recent decision is highly pertinent and illuminating. Likewise, the Circuit Court of Appeals for the Fifth Circuit, which

decided the present case, recently rendered a decision in *Johnson* v. *Dallas Downtown Development Co.*, 5 Wage Hour Rept. 984, involving the almost precise question herein presented. The Government's brief contains merely the citation of this decision. However, the Circuit Court in its opinion states, *inter alia*, that "we do not think that Congress intended that the Act with respect to those who are only 'engaged in commerce' should be stretched and strained to cover every person whose labor is of use or convenience or whose labor in some fashion contributes to the comfort or convenience of one who is so engaged."

CONCLUSION.

The case at bar presents an excellent opportunity for this Court to delimit and re-emphasize the scope of the Federal Wage and Hour Law. The decision in *Kirschbaum* v. *Walling*, *supra*, has not settled the issue of what "engaged in commerce" means. The Court should, we think, state again, with greater emphasis, that the guiding rule under the Fair Labor Standards Act is not the same as under the Federal Employers' Liability Act (53 Stat. 1404), or the National Labor Relations Act, or any other similar act of Congress. Employees of toll bridges and tunnels are not engaged "in" commerce. Bridges and tunnels are local enterprises; there are no factors of competition involved. Most vehicular travel over highway toll bridges is essentially local, probably covering distances of less than twenty miles. Highway trips are predominantly short.[3] Intrastate bridges might conceivably be used almost entirely for local intracity or intrastate movements.

The Court will judicially notice the existing gasoline rationing whereby motor vehicles are restricted in the amount of mileage traveled. Traffic volume over toll facilities in the rationed Eastern States has decreased about 40 per

[3] See House Document No. 272, 76th Congress, 1st Session, "Toll Roads and Free Roads" (pp. 7, 11-13).

cent below 1941 level.[3] Toll bridges owned and operated by State highway departments (see p. 2) are excluded, in any event, by reason of the definition of the term "employer" in Section 3(d) of the Act. An "employer" does not include "the United States or any State or political subdivision of a State." The reasoning of the Court in *Kirschbaum* v. *Walling*, *supra*, is a condemnation of any undue or arbitrary extension of coverage beyond the limits which Congress intended. These limits, we submit, will be more clearly defined by an affirmance by this Court of the decision below.

Respectfully submitted,

HARRY J. GERRITY,
Counsel for American Toll Bridge Association, and James River Bridge System, as Amici Curiae.

January, 1943.

[3] Informational Memorandum No. 22, November 30, 1942, subject: Traffic Volume Trends, Federal Works Agency, Public Roads Administration.

SUPREME COURT OF THE UNITED STATES.

No. 284.—October Term, 1942.

H. T. Overstreet, R. Brazle and L. L. Garvin, Petitioners, *vs.* North Shore Corporation. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 1, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

This is another case in which we must define the scope of the Fair Labor Standards Act.[1] 52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.* The precise question is whether petitioners who are engaged in maintaining or operating a toll road and a drawbridge over a navigable waterway which together constitute a medium for the interstate movement of goods and persons are "engaged in commerce" within the meaning of §§ 6 and 7 of the Act.[2]

Petitioners, together with others not parties to this petition, brought this action against respondent and a subsidiary under § 16(b) of the Act for the recovery of unpaid minimum wages, overtime compensation, and liquidated damages. Respondent moved to dismiss as to all the plaintiffs, and the motion as to petitioners was granted by the district court, leave to amend being given to the other complainants who are not before us. 43 F. Supp. 445. Petitioners appealed to the Circuit Court of Appeals which affirmed the order of dismissal. 128 F. 2d 450. The important question raised as to the coverage of the Act caused us to grant certiorari.

The relevant facts alleged in the complaint as amended, which are to be taken as true for purposes of the motion to dismiss, may be summarized as follows:

[1] Compare Kirschbaum Co. v. Walling, 316 U. S. 517; Warren-Bradshaw Drilling Co. v. Hall, 317 U. S. — (decided November 9, 1942); Walling v. Jacksonville Paper Co., — U. S. — (decided January 18, 1943); Higgins v. Carr Brothers, — U. S. — (decided January 18, 1943).

[2] Section 3(b) defines "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

Respondent owns and operates a toll road and a drawbridge which is part of the road. The toll road connects United States Highway No. 17, an interstate arterial highway, with Fort George Island, which lies off the northern coast of Florida, being separated from the mainland by the Intercoastal Waterway. The toll road crosses the Waterway at Sisters' Creek by means of the drawbridge which must be raised frequently to permit the passage of boats engaged in interstate commerce. The toll road constitutes an integral part of the highway system of the United States and provides the only means of land communication between Fort George Island and the Florida mainland. It is used extensively by persons and vehicles traveling between the island and points outside Florida in interstate commerce. Mail to and from other states as well as goods produced outside Florida and consigned to merchants on the island are transported over the toll road. Each of the petitioners was employed by respondent in connection with the operation of the toll road and drawbridge. Overstreet operated the drawbridge, raising it for the passage of boats through Sisters' Creek and lowering it for the resumption of traffic over the road; Brazle was engaged in maintenance and repair work on the road and the bridge; and Garvin sold and collected toll tickets from "vehicles using said toll road in interstate commerce". Petitioners received neither the minimum wages nor the overtime compensation prescribed by §§ 6 and 7 of the Act.

We think these allegations bring petitioners within the coverage of the Act and entitle them to recover if proved.

Our starting point is respondent's concession that no question of constitutional power is involved, but only the ascertainment of Congressional intent, that is, did Congress mean to include employees such as petitioners within the Act. In arriving at that intent it must be remembered that Congress did not choose to exert its power to the full by regulating industries and occupations which affect interstate commerce. See *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 522-23; *Walling* v. *Jacksonville Paper Co.*, — U. S. — (decided January 18, 1943). Respondent contends that petitioners are in this category, that their activities are local and at most only affect commerce. But the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase

"engaged in commerce". We said in the *Jacksonville Paper Co.* case, *supra*, "It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce". And in determining what constitutes "commerce" or "engaged in commerce" we are guided by practical considerations. *Jacksonville Paper Co.* case, *supra*; and see also *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S. 556, 558, dealing with what will shortly be pointed out as a similar question in the coverage of the Federal Employers' Liability Act.

A practical test of what "engaged in interstate commerce" means has been evolved in cases arising under the Federal Employers' Liability Act (45 U. S. C. §§ 51 *et seq.*) which, before the 1939 amendment (see 53 Stat. 1404), applied only where injury was suffered while the carrier was engaging in interstate or foreign commerce and the injured employee was employed by the carrier "in such commerce". 35 Stat. 65. In determining the reach of that phrase the case of *Pedersen* v. *Del., Lack. & West. R. R.*, 229 U. S. 146, held that an employee who was injured while carrying bolts to be used in repairing a railroad bridge over which interstate trains passed was engaged in interstate commerce within the meaning of the Liability Act. It was pointed out that tracks and bridges were indispensable to interstate commerce and "that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it." *Id.* at p. 151. See also *Phila., B. & W. R. R. Co.* v. *Smith*, 250 U. S. 101; *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571; *New York Cent. R. R. Co* v. *Porter*, 249 U. S. 168; *Kinzell* v. *Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130; *So. Pac.* v. *Industrial Accident Comm.*, 251 U. S. 259; *Phila. & Read. Ry. Co.* v. *Di Donato*, 256 U. S. 327; *Rader* v. *Baltimore & O. R. Co.*, 108 F. 2d 980. Compare *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S. 556; *Chicago & N. W. Ry. Co.* v. *Bolle*, 284 U. S. 74; *Chicago & E. I. R. Co.* v. *Commission*, 284 U. S. 296.

We think that practical test should govern here.[3] Vehicular roads and bridges are as indispensable to the interstate movement

[3] This has been the administrative interpretation. See Interpretative Bulletin No. 5 of the Wage and Hour Division of the Department of Labor, issued in November, 1939, at p. 7. This is set forth in the 1941 Edition of the Wage and Hour Manual at p. 34. See also p. 54.

Compare the dissenting opinion in Pedersen v. Fitzgerald Construction Co., 262 App. Div. (N. Y.) 665, 666, affirmed without opinion, 288 N. Y. 211.

of persons and goods as railroad tracks and bridges are to interstate transportation by rail. If they are used by persons and goods passing between the various States, they are instrumentalities of interstate commerce. Cf. *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 218. Those persons who are engaged in maintaining and repairing such facilities should be considered as "engaged in commerce" even as was the bolt carrying employee in the *Pedersen* case, *supra*, because without their services these instrumentalities would not be open to the passage of goods and persons across state lines. And the same is true of operational employees whose work is just as closely related to the interstate movement. Of course, all this is subject to the qualification that the Act does not consider as an employer the United States or any State or political subdivision of a State, and hence does not apply to their employees. § 3(d).

The allegations of petitioners' complaint satisfy this practical test. The road and bridge allegedly afford passage to an extensive movement of goods and persons between Florida and other states, and moreover the drawbridge presents an obstacle to interstate traffic by water over the Intercoastal Waterway if not properly operated. The operational and maintenance activities of petitioners are vital to the proper functioning of these structures as instrumentalities of interstate commerce. The services of Overstreet are necessary to prevent the drawbridge from being either a barrier to interstate navigation or else a gap in the vehicular way. Without the services of Brazle the facilities would fall into disrepair, and both operation and maintenance would seem to depend upon Garvin's collecting the toll from users of the structures. The work of each petitioner in providing a means of interstate transportation and communication is so intimately related to interstate commerce "as to be in practice and in legal contemplation a part of it" (*Pedersen's* case, *supra*) and justifies regarding petitioners as "engaged in commerce" within the meaning of the Fair Labor Standards Act.

Respondent resists the application of the test of the *Pedersen* and related cases, cited above, pointing out that there may be pitfalls in translating implications from the special aspects of one statute to another (see *Trade Comm'n* v. *Bunte Bros.*, 312 U. S. 349, 353), and claiming that significant differences exist between the Federal Employers' Liability Act and the Fair Labor Standards Act. The outstanding difference asserted is that a rail-

road company is actually engaged in commerce as a carrier of goods and persons, and since it is difficult to consider the business other than as a whole and to separate maintenance from transportation employees, there is good reason for treating maintenance employees as engaged in commerce. (Compare the *Pedersen* case, *supra*, at pp. 151-152.) As regards itself respondent says that it is not engaged in commerce, but only in providing facilities which those carrying on commerce may use, and therefore there is no sound basis for treating its maintenance and operational employees as engaged in commerce—rather they only affect commerce. Reliance is placed upon *Henderson Bridge Company* v. *Kentucky*, 166 U. S. 150, and *Detroit Bridge Co.* v. *Tax Board*, 294 U. S. 83, where in sustaining the power of the States of Kentucky and Michigan, respectively, to tax the franchise of domestic corporations operating bridges between Kentucky and Indiana and between Michigan and Canada, it was said that the respective bridge companies were not engaged in interstate or foreign commerce. We do not regard these objections as well taken.

The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. Both are aimed at protecting commerce from injury through adjustment of the master-servant relationship, the one by liberalizing the common law rules pertaining to negligence and the other by eliminating sub-standard working conditions. We see no persuasive reason why the scope of employed or engaged "in commerce" laid down in the *Pedersen* and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase "engaged in commerce" had those Federal Employers' Liability Act cases brought to its attention.[4]

The *Henderson* and *Detroit* bridge cases, *supra*, do not affect our conclusion. We have pointed out that decisions such as those, dealing with various assertions of state or federal power in the commerce field, are not particularly helpful in determining the scope of the Act. *Kirschbaum Co.* v. *Walling*, *supra*, pp. 520-21; *Walling* v. *Jacksonville Paper Co.*, *supra*. But even if we accept the premise of the *Bridge* cases and regard respondent as not en-

[4] See 83 Cong. Rec., 75th Cong., 3d Sess., Pt. 7, p. 7434, and Pt. 8, pp. 9168-71. See also Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. (1937), Pt. 1, pp. 42-43.

gaged in commerce, the result is not changed. The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the Act depends upon the character of the employees' activities. *Kirschbaum Co.* v. *Walling, supra*, p. 524; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. — (decided November 9, 1942); *Walling* v. *Jacksonville Paper Co., supra*. The fact that respondent may be subject to state taxation does not imply that it is free from federal regulation or that its road and drawbridge are not instrumentalities of interstate commerce. Petitioners, who are engaged in operating and maintaining respondent's facilities so that there may be interstate passage of persons and goods over them, are so closely related to that interstate movement as a practical matter that we think they must be regarded, under the allegations of their complaint, as "engaged in commerce" within the meaning of §§ 6 and 7 of the Act.

We conclude that petitioners' complaint was erroneously dismissed. Accordingly, the judgment below is reversed and the cause remanded to the district court for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice ROBERTS and Mr. Justice JACKSON dissent.

A true copy.

Test:

Clerk, Supreme Court, U. S.